93 No. 740

Supreme Court, U.S.
FILED
NOV - 8 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

SHU YAN ENG, also known as Ah Shu,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARGARET E. ALVERSON
Attorney for Petitioner
70 Lafayette Street
New York, NY 10013
(212) 608-1234

Dated: November 7, 1993

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(5442—1993)

Question Presented For Review

Whether the trial court, in denying Mr. Eng's motion to suppress physical evidence, wrongly construed and improperly applied the test for "inevitability" under the inevitable discovery exception to the Fourth Amendment prohibition against illegal searches and seizures. *Nix v. Williams*, 467 U.S. 431, 444 (1984). Moreover, the standard actually used by the Court of Appeals in affirming the district court's opinion is so ambiguous and speculative that it threatens the vitality of the warrant requirement and constitutes a clear departure from the rule as it has been developed. The issue presented for review in this petition is whether the Court of Appeals has created a new inevitability "test" that allows challenged evidence to be admitted whenever lawful means of obtaining the evidence *might* have been arisen and been employed later in an investigation.

Table of Contents.

	Page
Question Presented For Review	i
Opinion Below	2
Statement of Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case	4
Procedural History	4
Statement of Facts	6
Reasons Certiorari Should Be Granted	11
Conclusion	24
Relief Requested	26
Certification	27

Index to Appendix.

Appendix A—Opinion of United States Court of Appeals for the Second Circuit, Decided July 28, 1993 ..... 1a

Appendix B—Memorandum and Order of United States District Court for the Eastern District of New York, Decided March 31, 1993 ..... 25a

Appendix C—Opinion of United States Court of Appeals for the Second Circuit, Decided June 15, 1993 ..... 98a

Appendix D—August 10, 1993 Order of United States Court of Appeals for the Second Circuit Denying Petition for Rehearing with Suggestion for Hearing *In Banc* 126a

Appendix E—Judgment of Conviction Rendered November 19, 1991 ..... 128a

Page

TABLE OF AUTHORITIES.

CASES:

Center Art Galleries-Hawaii, Inc. v. United States, 875 F.2d 744 (9th Cir. 1989) 20

Nix v. Williams, 467 U.S. 431, 444 (1984)..... *passim*

United States v. Alvarez-Porass, 643 F.2d 54, 58 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981) 12

United States v. Buchanan, 904 F.2d 349, 357 (6th Cir. 1990) 12

United States v. Cherry, 759 F.2d 1196, 1204 (5th Cir. 1985) on remand, 794 F.2d 201 (1986)... 13, 20, 23

United States v. Crews, 445 U.S. 463, 469 (1980) ... 15

United States v. Eng, 971 F.2d 854 (2d Cir. 1992)..... *passim*

United States v. Eng, 819 F.Supp. 1198 (E.D.N.Y. 1993)..... *passim*

United States v. Eng, 997 F.2d 987 (2d Cir. 1993)..... *passim*

United States v. Feldhacker, 849 F.2d 293 (8th Cir. 1988)..... 13, 22

Page

United States v. Fisher, 700 F.2d 780, 783 (2d Cir. 1983) 12

United States v. Gorski, 852 F.2d 692, 695 (2d Cir. 1988) 12

United States v. Griffin, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974)..... 13

United States v. Griffin, *supra*, 502 F.2d at 961... 15, 20

United States v. Khoury, 901 F.2d 948, 960 (11th Cir. 1990) 12

United States v. Lamas, 930 F.2d 1099 (5th Cir. 1991) 13

United States v. Owens, 782 F.2d 146, 152 (10th Cir. 1986) 12

United States v. Pimentel, 810 F.2d 366, 369 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2900 (1988)... 11, 12

United States v. Roberts, 852 F.2d 671 (2d Cir. 1988) 20

United States v. Romero, 692 F.2d 699 (10th Cir. 1982) 13

United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985) .. 12

United States v. Silvestri, 787 F.2d 736 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988) 11

Page

United States v. Whitehorn, 829 F.2d 1225 (2d Cir. 1987), *cert. denied*, 487 U.S. 1237 (1988) 12

Federal Statutes:

18 U.S.C.:

§ 1956 and 2 ..... 2, 4
§ 3143(a) 5
§ 3143(b) 6
§ 3571 ..... 2, 3, 4
§ 3623 and 2 ..... 2, 3, 4

21 U.S.C.:

§ 841(a)(1) 2, 4
§ 841(b)(1) 2, 4
§ 846 2
§ 848(a) 2
§ 848(b) 2
§ 952(a) 2
§ 960(a)(1) 2

26 U.S.C.:

§ 7201 ..... 2, 3, 4

Page

Constitutional Amendment IV 3

Fed.R.Crim.P. Rule 29 5

Title 28, United States Code, Section 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993.

SHU YAN ENG, also known as Ah Shu,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Shu Yan Eng, respectfully prays that a Writ of Certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Second Circuit.

Opinion Below

The United States Court of Appeals for the Second Circuit rendered an opinion on July 28, 1993, reported at *United States v. Eng*, 971 F.2d 854 (2d Cir. 1992). (Appendix A.) That opinion vacated Mr. Eng's conviction and remanded the case to the district court for findings of fact in support of its denial of Mr. Eng's pre-trial motion to suppress evidence. The United States District Court for the Eastern District of New York rendered its findings by Memorandum and Order on March 31, 1993, reported at *United States v. Eng*, 819 F.Supp. 1198 (E.D.N.Y. 1993). (Appendix B). The Second Circuit affirmed the district courts's findings of fact and conclusions of law and reinstated Eng's conviction on June 15, 1993, reported at *United States v. Eng*, 997 F.2d 987 (2d Cir. 1993). (Appendix C). Eng's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on August 10, 1993. (Appendix D). The judgment of conviction was rendered November 19, 1991 (Appendix E).

Statement of Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The United States District Court for the Eastern District of New York had subject matter jurisdiction pursuant to an original indictment charging petitioner Shu Yan Eng with violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1), 846, 848(a), 848(b), 952(a), 960(a)(1), 960(a)(1); 18 U.S.C. §§ 1956 and 2 and to a superseding indictment which added charges under 18 U.S.C. §§ 1956, 3571, 3623 and 2, and 26 U.S.C. § 7201. The Court of Appeals for the Second Circuit had jurisdiction over Eng's appeal from the final order of the district

court dated November 13, 1991, entering a judgment of conviction and imposing sentence on three counts of income tax evasion. 26 U.S.C. § 7201, 18 U.S.C. §§ 3571, 3623.

On July 28, 1992, the Second Circuit vacated Mr. Eng's conviction and remanded the case to the district court. *United States v. Eng*, 971 F.2d 854 (2d Cir. 1992). (*Eng I*). The district court rendered an opinion as directed by the remand order on March 31, 1993. *United States v. Eng*, 819 F.Supp. 1198 (E.D.N.Y. 1993). (*Eng II*).

On June 15, 1993, the Second Circuit issued a second opinion reinstating and affirming the conviction below. *United States v. Eng*, 997 F.2d 987 (2d Cir. 1993). (*Eng III*). Mr. Eng timely petitioned for rehearing with a suggestion for a rehearing *en banc*. That petition was denied by order dated August 10, 1993.

Constitutional Provision Involved

Amendment IV—"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case

Procedural History

Shu Yan Eng was arrested on October 18, 1989 on federal narcotics and money laundering violations. Also on October 18, 1989, federal agents conducted a concededly illegal search of Mr. Eng's locked personal safe in his business at 92 Mott Street, New York, New York and seized a profusion of documents concerning his financial affairs. An income tax investigation via the expenditures method ensued, and in April, 1990, a superseding indictment was returned which added three counts of income tax evasion against Mr. Eng. 26 U.S.C. § 7201.

The United States District Court for the Eastern District of New York had subject matter jurisdiction pursuant to the original indictment charging petitioner with violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1), 846, 848(a), 848(b), 952(a), 960(a)(1), 960(a)(1); 18 U.S.C. §§ 1956 and 2 and pursuant to the superseding indictment containing additional charges under 18 U.S.C. §§ 1956, 3571, 3623 and 2, and 26 U.S.C. § 7201.

On October 15, 1990, a hearing was held before Honorable I. Leo Glasser, United States District Judge, on Mr. Eng's motion to suppress all evidence illegally seized from his safe and evidence derived therefrom. The government conceded that the search of the safe and the seizure of the contents were unlawful but sought to establish that the primary evidence found in the safe and that derived therefrom inevitably would have been discovered.

Mr. Eng's motion was denied in an oral ruling by the trial court on March 26, 1991. A jury trial followed at which the government introduced the majority of the evidence from the safe and additional derivative evidence to establish guilt on the three counts of income tax evasion.

Mr. Eng was acquitted of all charges except the three tax evasion counts.[1] On April 29, 1991, he was released on bail pending sentence. 18 U.S.C. §§ 3143(a). On November 13, 1991, Mr. Eng was sentenced to a term of 48 months incarceration, a total fine of $150,000, and a three year term of supervised release.

On December 17, 1991, the United States Court of Appeals for the Second Circuit granted Mr. Eng bail pending appeal. The Second Circuit had jurisdiction over Eng's appeal from the final order of the district court dated November 13, 1991, entering a judgment of conviction and imposing sentence.

On July 28, 1992, the Second Circuit vacated Mr. Eng's conviction and remanded the case to the district court for particularized findings of fact to support its denial of Mr. Eng's pre-trial motion to suppress physical evidence. *United States v. Eng*, 971 F.2d 854 (2d Cir. 1992). The panel retained jurisdiction over the appeal pending the district court's findings.

---

[1]Counts 17, 18, 19, 20 and 22 were dismissed at the close of the government's case. Fed.R.Crim.P. Rule 29.

On March 31, 1993, the district court reaffirmed the denial of Mr. Eng's motion to suppress with the exception of some items, the erroneous admission of which it deemed harmless error. *United States v. Eng*, 819 F.Supp. 1198 (E.D.N.Y. 1993).

In a decision issued on June 15, 1993, the Second Circuit panel issued its second opinion reinstating and affirming the conviction below. *United States v. Eng*, 997 F.2d 987 (2d Cir. 1993). Mr. Eng timely petitioned for rehearing with a suggestion for a rehearing *en banc*. That petition was denied by Order dated August 10, 1993.

Petitioner Shu Yan Eng now submits the instant petition for Writ of Certiorari. 18 U.S.C. §3143(b).

Statement of Facts

In February, 1989, the government began investigating Mr. Eng for alleged narcotics and money laundering activities. Agent Thomas Interdonato of the Internal Revenue Service ("IRS") began an income tax investigation using the expenditures method of proof in August or September, 1989. The investigation was insufficiently developed to establish tax evasion by Mr. Eng when the initial indictment was returned on October 4, 1989. Shortly after Mr. Eng's arrest on October 18, 1989, agents conducted the concededly illegal search of his personal safe at the French Ice Cream Parlor, seizing records which identified property acquired by Mr. Eng as well as persons and businesses with

whom he dealt. This enabled the government to conduct a major tax investigation of Mr. Eng by subpoenaing various persons and businesses whose identities were revealed in the documents in the safe.

Prior to the discovery of documents in Mr. Eng's safe, the tax investigation was confined largely to public records checks and a review of Mr. Eng's income tax returns. Those returns indicated that Mr. Eng had accounts at Bowery Bank, Manhattan Savings Bank, National Westminster Bank and Hang Seng Bank. However, the government had no account numbers. Bowery Bank was subpoenaed for Mr. Eng's accounts, but as the subpoena lacked account numbers, the bank erroneously responded in September, 1989, that it had no records for Mr. Eng.

Also prior to the illegal search, a confidential source informed agents that Mr. Eng had an interest in Chinese Moon Palace Restaurant located at 26 Bowery, New York, New York. Agent Interdonato looked up 26 Bowery in a New York County real estate directory and at the New York County Clerk's Office. This public records check showed that 26 Bowery Corp. had sold the building to Bowery Mansion, Inc. The government had no information detailing acquisition of the building at 26 Bowery by World Express International Holding Corporation, and did not know that World Express existed. Furthermore, the government was not pursuing any known leads to discover World Express financial records.

In summer, 1989, the government obtained tax returns for Bowery Mansion, Inc. and Chinese Moon Palace. For Chinese Moon Palace, the government also had a signature card, a corporate resolution, and "a couple of" monthly

statements obtained through an August, 1989 subpoena of National Westminster Bank for the corporate account. Deposited items, deposit slips, and other documents pertaining to the account were received later.

The government knew in spring or summer, 1989 that Mr. Eng owned a home at 134 Gauldy Avenue, Staten Island, New York, and that Long Island Savings Bank held the mortgage.

In sum, prior to the entry into the safe, the government was aware that Mr. Eng was somehow affiliated with the building at 26 Bowery ("26 Bowery") and Chinese Moon Palace. It knew he had a home at 134 Gauldy Avenue, Staten Island, and a 1988 Mitsubishi insured by State Farm. It knew in which banks he kept accounts but not the account numbers. The government knew that it was rumored that Mr. Eng had a condominium at 141 Division Street, New York, New York. *United States v. Eng,* 971 F.2d at 856-57. (*Eng I*).

The materials seized from the safe included:

> (A) canceled checks and other documents containing the account numbers of Eng's personal bank accounts at Manhattan Savings Bank, Hang Seng Bank, National Westminster Bank and Bower Bank; (B) customer records of money orders used by Eng to make mortgage payments on the 134 Gauldy Avenue home and a variety of other expenses; (C) documents relating to his 141 Division Street condominium confirming his ownership of same and revealing, among other things, the condominium unit number and pur-

> chase information; (D) documents relating to the purchase of the 26 Bowery building and identifying the corporate seller and its principals; (E) documents, including the National Westminster Bank checkbook of World Express International Holding Corp., disclosing in the first instance, the existence of this corporation and its role in the purchase of 26 Bowery and initial capitalization for Chinese Moon Palace; (F) documents evidencing Eng's ownership of and method of purchase for a boat and a home at 15 Collingwood Lane, Palm Coast, Florida, ownership of which the government was previously unaware; and, (G) documents establishing method of purchase by Mr. Eng of his vehicles. *Eng I*, 971 F.2d at 857.

The government obtained vast information, previously unknown and crucial to its tax investigation concerning Mr. Eng's financial affairs. Over the next several months, using the leads taken from the safe, the government revived its dormant tax by subpoenaing various persons and entities. Via post-search subpoenas and other investigative inquiries, the government obtained:

> (A) records for Mr. Eng's personal bank accounts (in addition to those initially uncovered in the safe); (B) records from the seller of the 141 Division Street condominium showing that the $200,000 purchase price was paid in cash; (C) closing documents for the purchase of 26 Bowery indicating amount and method of payment; (D) wire transfer records from Hong Kong banks including Hang Seng Bank, Kwangtung Bank, Wing Lung Bank, and Bank of Credit and Commerce which showed that approxi-

> mately $1,000,000 was transferred from Hong Kong to World Express accounts in New York for the purchase of 26 Bowery and Chinese Moon Palace; (E) a title search on the Florida house, identity of the seller and the seller's bank of deposit, and records of deposit items showing method of payment for the house; and (F) teller's check receipts and purchase records showing method of payment for Mr. Eng's 1988 Mitsubishi. *Eng I*, 971 F.2d at 857-58.

A superseding indictment adding three counts of income tax evasion for tax years 1986 through 1988 was returned against Eng several months later. At trial, the government sought to establish tax evasion for the relevant years through use of personal and corporate bank records some of which were seized from the safe in the first instance and others of which were obtained via post-search subpoenas, purchase records and foreign bank wire transfer records for 26 Bowery and Chinese Moon Palace obtained via post-search subpoenas, purchase records reflecting method of payment for the 141 Division Street condominium, the Florida house, boat, and 1988 Mitsubishi obtained via post-search subpoenas and investigation, and various customer copies of money orders and teller's checks used to pay expenses seized illegally from the safe. Mr. Eng was convicted of all three tax evasion charges but acquitted of all other charges.

Reasons Certiorari Should Be Granted

The instant petition for Writ of Certiorari brings up for review whether the district court erred in denying petitioner's motion to suppress physical evidence. Since the government conceded its search of Mr. Eng's locked personal safe in his business to be illegal, the issue turns upon whether evidence found in the safe and leads derived therefrom would have been discovered under the inevitable discovery doctrine enunciated in *Nix v. Williams*, 467 U.S. 431 (1984). The issue raised before this Court is whether, in affirming the denial of petitioner's motion and reinstating his conviction, the Second Circuit has adopted a test for determining "inevitability" which impermissibly allows reliance on the government's mere intention to investigate and other speculative elements heretofore not permitted by the *Nix* decision.

The criteria for determining when the discovery of evidence is in fact "inevitable" were not set forth in the *Nix* decision. Accordingly, a split among the United States Courts of Appeals has emerged with some circuits adopting a flexible approach to determining "inevitability" not requiring proof of an ongoing investigation at the time of the government misconduct while others require proof of active pursuit of an alternate line of investigation. *United States v. Pimentel*, 810 F.2d 366, 369 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 2900 (1988).The First Circuit, in *United States v. Silvestri*, 787 F.2d 736 (1st Cir. 1986), *cert. denied*, 487 U.S. 1233 (1988), adopted a flexible approach to determining inevitability. Indeed, Second Circuit decisions prior to *Eng III*, 997 F.2d 987 (2d Cir. 1993) focused on the state of the investigation at the moment of the illegal conduct of law

enforcement.[2] This approach is in keeping with *Nix's* holding that tainted evidence "may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred." *Nix*, 467 U.S. at 459, (Brennan, J., dissenting). The analysis requires a high degree of certainty that the challenged evidence would have been discovered through legal means and ensures that the illegal conduct bore no causal relationship to the acquisition of the challenged evidence.

Other Circuits addressing the issue have refused to apply the rule where the government did not establish active pursuit of an alternative line of investigation which would inevitably lead the challenged evidence. *United States v. Khoury*, 901 F.2d 948, 960 (11th Cir. 1990) (the government must establish that 1) police possessed and 2) were actively pursuing the lawful path of discovery when the illegality occurred); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied*, 471 U.S. 1117 (1985) ("The Government cannot later initiate a lawful avenue of obtaining the evidence and then claim that it should be admitted because its discovery was inevitable"); *United States v. Buchanan*, 904 F.2d 349, 357 (6th Cir. 1990) (inevitable discovery inapplicable where agents illegal entry into home "'tainted the only . . . investigation that was ongoing.'" quoting *United States v. Owens*, 782 F.2d 146, 152 [10th Cir. 1986] [inevitable discovery exception inapplicable due to

[2]*See, e.g., United States v. Gorski*, 852 F.2d 692, 695 (2d Cir. 1988); *United States v. Whitehorn*, 829 F.2d 1225 (2d Cir. 1987), *cert. denied*, 487 U.S. 1237 (1988); *United States v. Pimental*, 810 F.2d 366 (2d Cir. 1987); *United States v. Fisher*, 700 F.2d 780, 783 (2d Cir. 1983); *United States v. Alvarez-Porass*, 643 F.2d 54, 58 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981).

the "highly speculative assumption of 'inevitability'"]); *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982) ("We recognize the danger of admitting unlawfully obtained evidence 'on the strength of some judge's speculation that it would have been discovered legally anyway'"); *United States v. Feldhacker*, 849 F.2d 293 (8th Cir. 1988) (government must show that it would have uncovered the challenged evidence without reference to the illegally seized information); *United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974) (police believing they had probable cause not justified in entering a home without a warrant merely because they planned to get one); *United States v. Lamas*, 930 F.2d 1099 (5th Cir. 1991) (requiring proof 1) of a reasonable probability the evidence would have been found legally, and 2) that the government was actively pursuing a substantial alternative route at the time of the illegality); *United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir. 1985), on remand, 794 F.2d 201 (1986) ("when the police have not been in active pursuit of an alternate line of investigation that is at a minimum supportable by leads", application of the inevitable discovery exception would encourage police misconduct).

Nix itself requires that the government show active pursuit of an alternative line of investigation prior to any illegality. "An inevitable discovery finding is based on objective evidence concerning the *scope of the ongoing investigation which can be objectively verified or impeached.*" 467 U.S. at 456, n.8 (Stevens, J., concurring) (emphasis added). Further, "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification of impeachment." 467 U.S. at 444 at n.5.

Indeed, in *Eng I*, the Second Circuit stated:

> [P]roof of inevitability is made more convincing when the areas of the search or investigation are *well-defined*, the government effort is *planned and methodical*, and *a direct causal relationship* and *reasonably close temporal relationship exist between what was known and what had occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence*.

971 F.2d at 859 and cases cited therein (emphasis added).

Any less rigorous approach would substantially weaken the Fourth Amendment protections and the deterrent effect of the exclusionary rule by substituting probable cause to conduct a search with proof by a preponderance of the evidence of what could have or might have been done in an investigation. Proof, in hindsight, of the *availability* of an alternate line of inquiry would then be allowed to replace a showing of *inevitability*. As *Nix* stated the issue, "the interest in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred." *Id.* at 443-4 (emphasis in original). The rule does not require that the police be put in a *better* position; clearly, this would tip the balance between competing interests and would encourage rather than deter unlawful conduct. Consequently, courts must determine the position the police were in at the time of their unlawful conduct, not hypothesize or speculate as to what it might have been in the future. "The exception requires the district court to determine viewing affairs as

they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred." *Eng I*, 971 F.2d at 861 (emphasis in original).

Yet, in adopting the district court's findings and reinstating Mr. Eng's conviction, the Second Circuit abandoned the prior methodology of focusing on demonstrable historical facts and relied, instead, on speculation as to possible future events in an otherwise haphazard and stagnant investigation. Thus, the issue is raised as to whether the Court in *Eng III* created a new inevitability "test" which permits the use of challenged evidence whenever lawful means of discovering evidence theoretically may become available and may be employed at some future point during an investigation in contravention of the strictures of *Nix*.

Moreover, *Eng III* supplants the prosecution's mere intention or motivation to conduct a tax investigation for heretofore required proof of historical facts demonstrating that the necessary investigation inevitably *would* have been undertaken and *would* have led to challenged evidence. Because the primary question is whether the unlawful police conduct bore a causal relationship to the acquisition of the challenged evidence, *United States v. Crews*, 445 U.S. 463, 469 (1980), the court must excise from its analysis speculation on how an investigation might or could have progressed to the point at which discovery becomes inevitable. A court cannot rest its conclusion on facts unknown prior to the illegality, nor on speculation that customary practice or standard procedure would be followed, nor on unrealized intentions. *See, e.g. United States v. Griffin, supra*, 502 F.2d at 961 rejecting an inevitability finding based upon police assertion that they *intended* to get a search warrant: "[a]ny

other view would tend . . . to emasculate the search warrant requirement of the Fourth Amendment".

Eng III, however, stands the notion of a "historical analysis" on its head. The court did not confine its inquiry to the status of the investigation at the moment before the illegal search of Eng's safe, but rather extended it to contemplate what Agent Interdonato could have done in a faultless investigation at some unspecified future time. In positing that lawful means of obtaining the challenged evidence would have become available inevitably if the investigation progressed successfully, the court unjustifiably extrapolated the mandate that those means be in existence, and that they be "imminent even if yet unrealized."

The court's reliance on the thoroughness with which the government must conduct a successful expenditures tax investigation is singularly misplaced. In using what is ordinarily required in an expenditures tax case as the linchpin of its analysis, the court ignored the analytical framework of the inevitable discovery rule which requires it to assess "the scope of an ongoing investigation which can be objectively verified or impeached." *Nix, supra,* 467 U.S. at 456, n.8 (Stevens, J., concurring). Reliance upon what is typically done in other cases resorts to exactly what the courts do not allow: speculation rather than analysis of the demonstrated historical fact in a given case. It does not, as required by under *Nix,* provide a determination of what would have happened "in light of what the government knew and was pursuing *at the moment before the unlawful search.*" *Eng,* 971 F.2d at 862.

The court below nevertheless justified its findings because of the government's compelling *motivation* to pursue a tax investigation subsequent to the indictment of Mr. Eng for a narcotics conspiracy. The government's motivation, even coupled with its legal burden of proof in an expenditures case, cannot be equated with proof of a pre-existing well defined, planned and methodical legal line of inquiry *in this case* which would have led to the challenged records. That the government's burden of proving tax evasion via expenditures requires a time consuming, detailed investigation into a target's financial history, does not *a priori* mean that the prosecution will be successful. Quite simply, a thorough search of assets, sources of funds, and cash expenditures cannot be conducted without the requisite leads to pursue. While an "apprentice investigator" may know that canceled checks, deposit statements, records of expenditures, and the like are needed, the investigator must know whom to ask, where to ask for it, and what to ask for.

Lawful means, notably subpoenas, of obtaining much of the challenged evidence were neither in existence nor "imminent" when the safe was broken in to.[3] The government did not know whom to subpoena or that Eng even owned certain properties until locating pertinent records in the safe.[4] Rather, the court's conclusion that the government possessed compelling *motivation* to investigate Eng's fi-

[3]It bears emphasizing that the government was unaware of the bulk of Mr. Eng's assets and expenditures until finding the plethora of financial records contained within the safe. *See Eng I*, 971 F.2d at 856-859.

[4]For instance, Agent Interdonato did not know Mr. Eng had a house or a boat in Florida until finding ownership records in the safe. He did not even bother to write down the pre-search "tip" that Mr. Eng

(Footnote continued on next page.)

nances was coupled with a broad concept of what is "routine", unsupported by evidence in this case and therefore unjustifiable, to envision the perfect tax investigation with correspondingly perfect and therefore inevitable results. Consequently, "demonstrable, historical facts" were replaced hypothesis, speculation, and mere intention, the very avenues which courts have previously held do not constitute inevitability and which the court in *Eng I* cautioned could not be relied upon. "Our initial concern is the possibility that the government's tax evasion investigation was not sufficiently active or developed to support the government's broad claim of inevitable discovery." 971 F.2d at 861.

In *Eng III*, the court reversed itself: rather than "assess the scope of the ongoing investigation which can be objectively verified or impeached," it hypothesized an expanded investigation which encompassed areas not previously explored because the government was unaware of them until first uncovering them in the safe. Steps never taken, or taken only after the illegal search netted a vast quantity of evidence which was actually used to draw up subpoenas, were presumed to be imminent as if mere intent sufficed to meet the strictures of *Nix* and its progeny. It is not.

The court below misapplied the test for inevitability in failing to confine its analysis to demonstrable historical facts that established the state of the investigation *prior* to

(Footnote continued.)
owned an unspecified condominium at 141 Division Street, a multi-unit dwelling. He did not know that World Express existed and was completely unaware that the purchase of 26 Bowery and the opening of Chinese Moon Palace were funded via wire transfers from several Hong Kong banks. *Eng I*, 971 F.2d At 863-64.

the illegal conduct. The progress of an ongoing independent investigation is the focal point under *Nix* for only then can a court be assured that there was no causal relationship between unlawful police conduct and acquisition of challenged evidence.

The decision in *Eng III* is founded on speculative, intangible, and subjective factors. The court relies on motivation, *Eng III*, 997 F.2d at 991, and intention, *Id.* at 992-3, to support its conclusion that discovery of the evidence was inevitable because further investigation was inevitable. The determination that discovery of bank accounts, money orders, and other personal and real property was inevitable assumes: 1) the government was strongly motivated, if not compelled, to prosecute Eng for income tax evasion; 2) likewise, the government was strongly motivated or compelled to identify and locate particular assets and the source of the funds used to acquire them even though it lacked vital leads until uncovering records in the safe; 3) particular procedures and practices are typical or routine in such investigations and would have been followed in this case despite the lack of documented evidence to support this assumption; 4) Interdonato's investigation would have encompassed as its object all evidence either found in the safe or derived from evidence found in the safe again despite any documentation to support such a broad conclusion; 5) Interdonato would have taken the necessary investigative steps to procure that evidence through lawful means; and 6) those steps necessarily would have been successful, *i.e.*, produced the challenged evidence.

Thus, a chain of unsupported assumptions led to inevitability. For instance, the Second Circuit agreed with the district court that subpoenas would have been served because: "(1) it was the *routine* course taken in an expendi-

tures investigation; (2) Interdonato's pre-search notes indicated that he would obtain such subpoenas (despite lack of account numbers); and (3) Interdonato testified that he *would have* subpoenaed the banks." *Eng III*, 997 F.2d at 992, citing *Eng II*, 819 F.Supp. at 1213-14. That a typical investigation may entail the issuance of subpoenas says nothing in particular about this investigation. Nor does that fact guarantee with any degree of certainty either that the specific entities known to Interdonato only after the illegal search would have been subpoenaed or that those subpoenas would have produced the required information. Rather than requiring proof that subpoenas were issued, or at least being prepared, the Second Circuit agreed with the trial court that Interdonato's *intention* to subpoena each entity was sufficient. *Eng III*, 997 F.2d at 992-3. Intention is not a "demonstrable historical fact", nor is it a tangible expression of a meticulously planned investigation.[5] It is merely a thought and has, prior to *Eng III*, been held insufficient to support a finding of inevitability.[6] A mere thought now suffices to

---

[5]In an August meeting with prosecutors, Interdonato purportedly memorialized his intent to subpoena each of the banks subpoenaed only *after* the search of the safe revealed account numbers and the existence of accounts of which he was previously unaware. *See Eng II*, 819 F.2d at 1213. How the August 16, 1989 notation "obtain grand jury subpoenas re Banks" in any way supports that Interdonato inevitably would have subpoenaed the specific banks which he did after the October 18, 1989 illegal search, or indicates that this lawful step of getting the necessary data was imminent, over two months before it was actually taken, is beyond comprehension.

[6]Cases in which there was no finding of inevitability are those in which the police "planned to" but did not get a warrant *Griffin, supra*, had requisite information but made no effort to get a warrant, *Cherry, supra*, or relied upon subpoenas which were not being responded to, *United States v. Roberts*, 852 F.2d 671 (2d Cir. 1988), or subpoenas for the very items which were illegally seized. *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 744 (9th Cir. 1989).

negate the warrant requirement, a holding as unacceptable as one equating a mere hunch with probable cause.

In finding that evidence of wire transfers obtained from Hong Kong banks *months* after the search would have been discovered inevitably, the court engaged in precisely the type of "hypothesized leapfrogging" from one subpoena recipient to the next against which it first cautioned. *Eng I*, 971 F.2d at 860. *Eng III*, on the other hand accepted that "the information inevitably would have been discovered since it is apparent from the district court findings that *investigations of this nature* (emphasis added) involve a thorough analysis of all expenditures and receipts of funds into business accounts." *Id.*, at 997. The assertion that subpoenaing these banks (via assistance from Hong Kong authorities, a step no where contemplated pre-search) was inevitable once the investigation uncovered wire transfers the World Express account graphically demonstrates just how wide of the mark the government's inevitability showing was here when compared to that in *Nix*. In *Nix*, investigators who were meticulously combing an area in search of a murder victim's body would have found the body within hours had defendant's illegally obtained confession not led them directly to it. Here, several months and several investigative steps made possible by virtue of the information found in the safe led to the challenged evidence from overseas banks. The *Eng III* court simply took for granted the occurrence of these events which were not even remotely grounded in pre-search events. Not only had the transfers not been found at the time of the illegal search, the government did not even know World Express existed. Whether this corporation would have been discovered is left to speculation. Discovery of the wire transfers thereafter unraveled

down a long line of attenuated events not grounded in any pre-search event.

Continuing, the court in *Eng III* decided that evidence not known to exist at the time of the illegal search such as payment via money order for various expenses would have "turned up" some time in the future because "these expenses are both *routine* sources of information and targets of investigation in expenditure cases."*Id.*, at 994-95, *citing Eng II*, 819 F. Supp. at 1224 (emphasis added). There was no showing that the government knew, pre-search, that Mr. Eng incurred these expenses or that they *were a pre-search source of information and a target of Interdonato's investigation.*

The analysis employed below was an incorrect and misguided application of a previously strenuous test.

> An investigation conducted over an infinite time with infinite thoroughness will, of course, 'ultimately or inevitably' turn up any and all pieces of evidence in the world. Prosecutors may not justify unlawful extractions of information *post hoc* where lawful methods present only a theoretical possibility of discovery. . . . [T]he lawful discovery must be inevitable through means that would actually have been employed.

United States v. Feldhacker, 849 F.2d 293, 296 n.4 (8th Cir. 1988)

The tax investigation of Mr. Eng was in its incipient stages and "was not sufficiently active or developed prior to the search to support the government's broad claim of inevitable discovery." *Eng I*, 971 F.2d at 861. The Court is left with Interdonato's hindsight as to what he could have done or how he would have behaved. However, the " 'mere intention to use legal means' " does not satisfy a finding of inevitability. *Eng I*, 971 F.2d at 861, quoting *United States v. Cherry, Supra*, 579 F.2d at 1205 n. 10.

Indeed, the district court recognized this investigation, which commenced in late August, early September 1989 was still in its formative stages when the illegal search occurred. *Eng II*, 819 F.Supp. at 1212. While admitting that the investigation was in its formative stages, the court nonetheless concluded that the agent was "well along the road of subpoenaing bank and other records" when the illegal search occurred. *Eng II*, 819 F.Supp. at 1226. This finding ignores Interdonato's testimony that prior to the arrest and search, he confined himself to "IRS checks, governmental checks, public records checks."[7] As is evident from a comparison of what was done or known prior to the search with what was done after, *using the very documents taken out of the safe*, it becomes manifest that the tax investigation was not at all developed. *Eng I*, 971 F.2d at 861. Moreover, the government conceded that the seized records accelerated its investigation leaving the only conclusion that the safe indeed divulged the evidence needed to conduct it. The short time span between commencement of the investiga-

[7]During the entire investigation, Interdonato requested deposit items from banks only four times: for the Florida house, the boat, 141 Division, and Eng's attorney in the closing on 26 Bowery. Each of these requests was made after the search based upon records found in the safe.

tion and the search negates a finding of active pursuit of an ongoing investigation sufficiently developed to support a claim of inevitability. The trial court subverts the analysis by rationalizing the failure to investigate the few leads the government did possess by saying that since the investigation was in its formative stages, the agent just had not gotten around to doing what he needed to do. The fact that the investigation was in its incipient stages may explain why Mr. Eng had not yet been indicted for tax evasion. It does not establish how discovery of the challenged records was inevitable.

In short, Eng does not contend that the government would not have conducted a large scale investigation of his finances; he contends that it could not because it lacked the necessary data until discovery of his entire financial history in the safe.

Conclusion

If the panel decision in *Eng III* is allowed to stand, a citizen's rights under the Fourth Amendment will have receded several feet. No longer will it be necessary to show true "inevitability," [which is itself a proposition open to question] it will only be necessary to show the intention to investigate. Under the premise of *Eng III* that routine investigations are *always* successful, illegally seized evidence will be *always* be admitted upon the government's assertion that it intended to pursue an investigation which encompassed exhaustive means and envisioned perfect results. Such a holding cannot be permitted to stand. This Court is respectfully requested to revisit the issues left open after *Nix v. Williams* in order to articulate the parameters of what constitutes "inevitability" under the inevitable discovery

exception to the exclusionary rule for the benefit and guidance of lower courts applying the doctrine.

WHEREFORE IT IS RESPECTFULLY SUBMITTED that for the reasons assigned herein, the Court should grant the instant Writ of Certiorari so as to provide jurisprudential insight into and set the parameters for determining just what showing is required by the prosecution to establish "inevitability" under the inevitable discovery exception to the exclusionary rule.

MARGARET E. ALVERSON, Esq.
Attorney for Shu Yan Eng
70 Lafayette Street
New York, New York 10013
(212) 608-1234

Relief Requested

WHEREFORE, Petitioner Shu Yan Eng moves this Court to grant a Writ of Certiorari in order to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

MARGARET E. ALVERSON, Esq.
Attorney for Shu Yan Eng
70 Lafayette Street
New York, New York 10013
(212) 608-1234

Certification

Undersigned counsel hereby certifies that she is a member in good standing of the bar of this Court, having been admitted to practice on March 19, 1990.

Dated: New York, New York
November 7, 1993

MARGARET E. ALVERSON, Esq.
Attorney for Shu Yan Eng
70 Lafayette Street
New York, New York 10013
(212) 608-1234

APPENDIX A—Opinion of United States Court of Appeals for the Second Circuit, Decided July 28, 1993.

971 F.2d 854 (2nd Cir. 1992)

UNITED STATES of America, Appellee,

v.

Shu Yan ENG, also known as Ah Shu; Cho-Kuen Wong; King Albeo Kong; Foo Wing Yam; Sue Sang Ong; Hon Keung Ng, Defendants,

Shu Yan ENG, also known as Ah Shu,
Defendant-Appellant.

No. 1151, Docket 91-1683.

United States Court of Appeals,
Second Circuit.

Argued April 2, 1992.
Decided July 28, 1992.

Defendant was convicted in the United States District Court for the Eastern District of New York, Israel Leo Glasser, J., of tax evasion, and he appealed. The Court of Appeals, Miner, Circuit Judge, held that remand was required for particularized finding as to manner in which, if at all, each piece of evidence challenged by defendant and said by government to be admissible under inevitable discovery exception to exclusionary rule would have been inevitably discovered.

Vacated and remanded.

1. Criminal Law 394.1(1, 3)

Exclusionary rule generally prohibits admission at trial of evidence seized in searches deemed unreasonable under Fourth Amendment, as well as of derivative evidence acquired as indirect product or result of unlawful search. U.S.C.A. Const.Amend. 4.

2. Criminal Law 394.1(3), 394.6(4)

"Doctrine of inevitable discovery," as exception to the exclusionary rule, allows unlawfully obtained evidence to be admitted at trial if government can establish by preponderance of the evidence that information ultimately or inevitably would have been discovered by lawful means. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law 394.1(3)

For inevitable discovery to be demonstrable, under exception to exclusionary rule, it must be case that evidence would have been acquired lawfully through independent source absent government misconduct. U.S.C.A. Const.Amend. 4.

4. Criminal Law 394.6(4)

Under inevitable discovery exception to exclusion rule, where government is able to demonstrate substantial and convincing basis for believing that requisite information

would have been obtained by subpoena, government may rely upon subpoena power to meet burden of proving inevitable discovery by preponderance of the evidence; however, various factors that might prevent positive response to subpoena must also be considered. U.S.C.A. Const.Amend. 4; Fed.Rules Cr.Proc.Rule 17, 18 U.S.C.A.

5. Criminal Law 394.1(3)

Subpoenas must not serve as after the fact "insurance policy" to validate unlawful search under inevitable discovery doctrine. U.S.C.A. Const.Amend 4.

6. Criminal Law 1181.5(7)

Remand was required for particularized finding as to manner in which, if at all, each piece of evidence ruled admissible under inevitable discovery exception to exclusionary rule would have been inevitably discovered. U.S.C.A. Const.Amend. 4.

Faith E. Gay, Asst. U.S. Atty., New York City (Andrew Maloney, U.S. Atty., Eastern District of New York, Susan Corkery, Asst. U.S. Atty., New York City, of counsel), for appellee.

Margaret E. Alverson, New York City (Herbert V. Larson, Jr., New York City, of counsel), for defendant-appellant.

Before MINER and McLAUGHLIN, Circuit Judges, and MARTIN, District Judge.*

MINER, Circuit Judge:

*The Hon. John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Defendant-appellant Shu Yan Eng appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Glasser, *J.*) on November 13, 1991. Eng was convicted, after a jury trial, of tax evasion for the tax years 1986 through 1988, *see* 26 U.S.C. § 7201. The district court sentenced Eng to a term of imprisonment of 48 months but granted Eng bail pending this appeal. The conviction followed the district court's denial of Eng's motion to suppress certain records obtained by the government in an unlawful search and other evidence claimed by Eng to have been derived from materials discovered in the unlawful search.

The district court based its denial of Eng's motion on the "inevitable discovery" doctrine, recognized by the Supreme Court in *Nix v. Williams,* 467 U.S. 431, 194 S.Ct. 2501, 81 L.Ed.2d 377 (1984), as an exception to the exclusionary rule. Eng contends that the government failed to meet its burden under *Nix* of proving by a preponderance of the evidence that absent the unlawful search, lawful discovery of the challenged evidence was inevitable. Specifically, Eng argues that the government's version of what evidence would have been discovered absent the search is too speculative, and that our ruling in *United States v. Roberts,* 852 F.2d 671 (2d Cir.), *cert. denied,* 488 U.S. 993, 109 S.Ct. 556, 102 L.Ed2d 583 (1988), prohibits the government from relying on the use of subpoenas in meeting its burden of proof.

Our consideration of the issues presented by this case is hindered by the lack of specific factual determinations by the district court. Accordingly, we vacate the judgment of conviction and remand this case to the district court for particularized findings as to the manner in which, if at all, each piece of evidence challenged by Eng, and said by the

government to be admissible under the inevitable discovery exception, would have been inevitably discovered.

BACKGROUND

I. Events Prior to the Unlawful Search

In February 1989, Eng came under investigation by the Drug Enforcement Administration and the Internal Revenue Service ("IRS") for suspected narcotics and money laundering violations. The investigation began after informants indicated that Eng was importing large quantities of narcotics from the Far East and laundering money through various businesses and properties in the United States. As is customary to following commencement of narcotics and money laundering investigations, the IRS began a tax evasion investigation of Eng in August or September 1989. The investigation was conducted by IRS Agent Thomas Interdonato. Interdonato used the "expenditures method" of proof, which premises a tax evasion case on a comparison between the taxpayer's income and non-taxable resources, such as gifts and loans, and the taxpayer's expenditures. The government is constrained under this method to show that non-taxable sources of funds spent by the taxpayer did not exist, a burden that involves a thorough search of assets, sources of money, and cash inflows and outflows. *See generally United States v. Bianco,* 534 F.2d 501 (2d Cir.), *cert. denied,* 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976). Prior to the unlawful search, the following items had been identified by Interdonato:

A. *Eng's Personal Bank Accounts*

It appears that Interdonato began his investigation with Eng's personal tax returns, which were prepared by Wang F. Luk, an accountant. The interest income information reported on Eng's tax returns indicated that Eng had personal bank accounts in New York at Manhattan Savings Bank, Hang Seng Bank, National Westminster Bank, and Bowery Bank. However, Interdonato had no account numbers. Bowery Bank was subpoenaed for account records but responded (erroneously, as it later turned out) that it had no account for Eng.

B. *134 Gauldy Avenue*

Eng's tax returns indicated that Eng resided at 134 Gauldy Avenue, in Staten Island, New York. As regards this property, Interdonato performed a title search which revealed the identity of a mortgagee, Long Island Savings Bank. In response to a subpoena, the mortgagee produced Eng's mortgage application, payment history and the amount due on the mortgage.

C. *141 Division Street*

Interdonato had confidential information that Eng owned a condominium at 141 Division Street in New York City.

D. *26 Bowery and Chinese Moon*

The government possessed confidential information that Eng was President of Chinese Moon Palace Restaurant, Inc., located in the 26 Bowery building in New York City. Inter-

donato performed a title search on the 26 Bowery building and discovered that the building had been sold in December 1986, by a corporation called 26 Bowery Corp., to a corporation called Bowery Mansion, Inc. The title search also revealed that the selling corporation's attorney was Ronald De Petris, Esq., and that Eng was President of Bowery Mansion. Interdonato then obtained the certificate of incorporation and tax returns for Bowery Mansion, and the corporate tax returns for Chinese Moon, which confirmed much of the foregoing information. The Chinese Moon tax returns listed a bank account at National Westminster Bank. Interdonato subpoenaed National Westminster Bank for Chinese Moon account records, obtaining monthly statements and information on deposits. These documents showed that cashier's checks, totalling $140,000 and issued by Hang Seng Bank, had been deposited to Chinese Moon's account in June and September of 1987. Through the government's Treasury Enforcement Communication System, Interdonato further learned of two large cash deposits of $20,000 and $12,000 to Chinese Moon's account.

II. The Unlawful Search

On October 18, 1989, about two months after the commencement of Interdonato's investigation, Eng was arrested in connection with an indictment charging him with administering a continuing criminal enterprise, money laundering, and a variety of narcotics violations. Eng was not charged with tax evasion at that time. On the date of Eng's arrest, authorities seized the 26 Bowery building, as well as one of Eng's businesses, the French Ice Cream Parlor, located on Mott Street in New York City. Eng's personal safe in the French Ice Cream Parlor was searched without a warrant,

and a variety of materials was seized from the safe. The government concedes that the search was unlawful.

The materials seized from the safe included: (A) cancelled checks and other documents containing the account numbers of Eng's personal bank accounts at Manhattan Savings Bank, Hang Seng Bank, National Westminster Bank and Bowery Bank; (B) customer records of money orders payable to Long Island Savings Bank, the money orders having been used by Eng to make mortgage payments on the 134 Gauldy Avenue home; (C) documents relating to the 141 Division Street condominium, revealing among other things the condominium unit number; (D) documents relating to the purchase of the 26 Bowery building, and showing that Sol Leitner and Frieda Grant were the owners of 26 Bowery Corp. (the seller of the 26 Bowery building); (E) the National Westminster Bank checkbook of a corporation called World Express International, Inc.; (F) documents evidencing Eng's ownership of a boat and a home at 15 Collingwood Lane, in Palm Coast, Florida; and (G) additional customer records of money orders, these money orders having been used by Eng to pay a variety of expenses.

III. Events Subsequent to the Unlawful Search

In the months following the search of Eng's safe, Interdonato:

(A) subpoenaed the banks at which Eng maintained personal accounts, and thereby obtained statements and records for the accounts;

(B) performed a title search on the 141 Division Street condo. The title search revealed the identities of the seller and seller's attorney, who were then subpoenaed by Interdonato. These subpoenas produced documents showing that Eng had purchased the condo in December 1988 for $200,000 cash;

(C) subpoenaed the principals of 26 Bowery Corp. and its attorney, and received closing documents relating to the sale of the 26 Bowery building. Another subpoena was issued to Frank Lam, one of Eng's corporate lawyers, who produced checks used to pay 26 Bowery Corp. in the transaction. The total mix of information revealed that Bowery Mansion paid $1.7 million for the 26 Bowery building, half of which was paid in cash, and half of which was financed by a mortgage given to 26 Bowery Corp., by Bowery Mansion;

(D) subpoenaed Hang Seng Bank, the source of the cashier's checks deposited to Chinese Moon's National Westminster Bank account. Documents produced by Hang Seng revealed that the cashier's checks originated with parties in Hong Kong;

(E) subpoenaed National Westminster Bank for records relating to World Express. This subpoena provided Interdonato with information that between August and November 1986, and again in September 1987, cashier's checks were deposited and wire transfers made into the World Express account, from Wing Lung Bank, Kwantung Provincial Bank, and the Bank of Credit and Commerce International. These transfers totaled about $1 million. Interdonato in turn subpoenaed these three banks, receiving records on how, when and by whom the cashier's checks were pur-

chased and the wire transfers made. The records indicated the source of funding for World Express to be parties in Hong Kong. It also became evident that World Express had purchased Bowery Mansion prior to Bowery Mansion's purchase of the 26 Bowery building, and was the ultimate principal behind the 26 Bowery building;

(F) performed a title search on the Florida home, which revealed the identities of the seller, the seller's attorney, the real estate broker and the broker's bank. Records produced in response to subpoenas revealed that Eng had purchased the Florida house in December 1986, for about $153,000 in cash, cashier's checks, and money orders. Interdonato also determined, from Florida's Department of Natural Resources, that Eng had purchased his boat from the Flagler County Marina. The Marina and the Marina's bank were subpoenaed, revealing that Eng purchased the boat in April 1987 for $43,730 in cash and money orders.

IV. Eng's Conviction for Tax Evasion

In April 1990, about six months after the search of the safe and eight months after Interdonato's investigation began, a superseding indictment added to the existing charges against Eng three tax evasion counts relating to the tax years 1986 through 1988. The evidence the government sought to introduce at trial in connection with the tax evasion charges included:

(1) the bank statements and records of Eng's personal bank accounts, obtained by post-search subpoenas from Eng's banks;

(2) the customer records of the money orders, obtained in the search of the safe, used to pay Long Island Savings Bank (the mortgagee of the 134 Gauldy Avenue property);

(3) the documents relating to the 141 Division Street condo, obtained by post-search subpoenas;

(4) the documents relating to the purchase of the 26 Bowery building, obtained by post-search subpoenas;

(5) the records relating to the National Westminster Bank account of Chinese Moon, obtained by subpoena prior to the search;

(6) the records relating to the source of the cashier's checks deposited into, and wire transfers made to, the National Westminster Bank accounts of World Express and Chinese Moon, obtained by post-search subpoenas;

(7) the documents relating to the Florida home and boat, obtained by post-search subpoenas; and

(8) the other customer records of money orders used by Eng to pay a variety of expenses, and obtained in the search of the safe.

This evidence in large part formed the basis for the government's claim that Eng was spending money in excess of his taxable income, that Eng lacked non-taxable sources of the monies being spent, and that Eng had not reported taxable income of about $118,000 in 1986, $39,000 in 1987, and $205,000 in 1988.

Eng moved to suppress the evidence, arguing that it was either seized in the unlawful search of the safe, or was the product of materials seized from the safe. In denying Eng's motion, and allowing admission of all the challenged evidence, the district judge stated that "I have no difficulty in concluding the inevitable discovery doctrine is clearly applicable here in my view," and that "I have no question in my mind what my conclusions are. I have gone through Nixon [*sic*] versus Williams and the other cases with great care and I am satisfied that the inevitable discovery principle will apply." The district judge initially indicated that he would provide a "rather lengthy" opinion to support his conclusions. However, the judge later decided not to issue the promised opinion because, in his view, the "inevitable discovery doctrine [gave] rise to a conclusion which I thought was compelled" under the circumstances. He did not elaborate further on any aspect of the evidence challenged by Eng, or explain what "compelled" his conclusion that each item of evidence inevitably would have been discovered lawfully absent the search. After a jury trial, Eng was convicted of the tax evasion charges, but was acquitted of the continuing criminal enterprise, money laundering and narcotics charges.

DISCUSSION

I. The Inevitable Discovery Doctrine

[1] The exclusionary rule generally prohibits admission at trial of evidence seized in searches deemed unreasonable under the Fourth Amendment, *see Weeks v. United States,* 232 U.S. 383, 398, 34 S.Ct. 341, 346, 58 L.Ed 652 (1914), as well as of derivative evidence acquired as an indirect product or result of the unlawful search, *see Wong Sun v.*

United States, 371 U.S. 471, 484-88, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963). The Supreme Court has long emphasized, however, that the exclusionary rule does not automatically render all evidence gained in or as a result of an unlawful search forever "sacred and inaccessible," *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920).

[2, 3] The doctrine of inevitable discovery, an exception to the exclusionary rule, allows unlawfully obtained evidence to be admitted at trial if the government can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984). The inevitable discovery doctrine is related to, and is "an extrapolation from," the independent source doctrine, another exception to the exclusionary rule. *See Murray v. United States,* 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988). For inevitable discovery to be demonstrable, it must be the case that the evidence would have been acquired lawfully through an independent source absent the government misconduct. *See id.; see also Nix,* 467 U.S. at 448, 104 S.Ct. at 2511.

The Supreme Court has stated that proof of inevitable discovery "involves no speculative elements but focuses on *demonstrated historical facts capable of ready verification or impeachment* and does not require a departure from the usual burden of proof at suppression hearings." *Nix,* 467 U.S. at 444 n. 5, 104 S.Ct. at 2509 n. 5 (emphasis added). Indeed, the facts of cases applying the inevitable discovery doctrine suggest that proof of inevitability is made more convincing when the areas of the search or investigation are

well-defined, the government effort is planned and methodical, and a direct causal relationship and reasonably close temporal relationship exist between what was known and what had occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence. *See, e.g., Nix,* 467 U.S. at 448-50, 104 S.Ct. at 2511-12 (discovery of body in culvert inevitable because 200 volunteers actively were searching culverts for the body, one search team was only a few miles away from the body at the time of unlawful confession, area in which the body was found was the next to be searched, and testimony indicated that absent the confession body would have been found in no more than five hours); *United States v. Whitehorn,* 829 F.2d 1225, 1231 (2d Cir.1987) (discovery inevitable where warrant application for search of apartment was being prepared well before unlawful search of apartment, and "overwhelming probable cause" existed without reference to anything discovered in apartment), *cert. denied,* 487 U.S. 1237, 108 S.Ct. 2907, 101 L.Ed.2d 939 (1988); *United States v. Pimentel,* 810 F.2d 366, 367-69 (2d Cir.) (discovery of letters from subcontractor to contractor inevitable because "ongoing" audit and search of contractor's files "surely" would have uncovered the letters).

II. The Role of Subpoenas in Inevitable Discovery Analysis

In *United States v. Roberts,* 852 F.2d 671 (2d Cir.), *cert. denied* 488 U.S. 993, 109 S.Ct. 556, 102 L.Ed.2d 583 (1988), the government had issued a grand jury subpoena for certain documents obtained months later during an unlawful search. The government claimed that the documents inevitably would have been discovered due to the outstanding subpoena. In rejecting this argument, we said:

> The mere fact that the government serves a subpoena, however, does not mean that it will obtain the documents it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, Fed.R.Crim.P. 17(c), when it violates the right against self-incrimination, *United States v. Doe*, 465 U.S. 605, 610-12[] [104 S.Ct. 1237, 1241-42, 79 L.Ed.2d 552] (1984), or when it calls for privileged documents. *In re Grand Jury Subpoena Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984). Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena.

Id. at 676; *see also Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 754-55 (9th Cir.1989) (following *Roberts*). In this case, the information derived from subpoenas plays a significant role in the government's claim that the evidence challenged by Eng inevitably would have been discovered absent a search of the safe. Eng contends that *Roberts per se* forbids the government from using the subpoena power to make its inevitable discovery case.

Contrary to Eng's contention, we did not hold in *Roberts* that the subpoena power *never* may be relied upon by the government to meet the inevitable discovery burden of proof. The subpoena power conferred upon the government under the rules of criminal procedure, *see* Fed. R.Crim.P.17, serves important purposes as an investigative tool and as a method of obtaining evidence. The *per se* prohibition urged by Eng would conflict with the Supreme Court's requirement that the exclusionary rule, and the inevitable discovery exception, should not be employed so as to

place the government in a worse position than it would have been in had no unlawful search occurred. *See Nix*, 467 U.S. at 443-44, 104 S.Ct. at 2509. Nor did we decide in *Roberts*, as the government seems to suggest, that there was some particular reason to suspect that the subpoena issued in that case was invalid.

[4] Rather, we held in *Roberts* that the "mere fact" of an outstanding subpoena apparently dormant for "several months before" the unlawful search, and having no prospect of producing results, was an insufficient basis for concluding that discovery of the evidence was inevitable. *See Roberts*, 852 F.2d at 676. The circumstances revealed in *Roberts*, which made it unlikely that the subpoena would produce any evidence, must be contrasted with a situation where the government can demonstrate a substantial and convincing basis for believing that the requisite information would have been obtained by subpoena. Where the government is able to make such a demonstration, there is no reason why the government may not rely upon the subpoena power as one way it might meet the burden of proving inevitable discovery by a preponderance of the evidence. However, the various factors that might prevent a positive response to a subpoena must also be considered. *See id.*

[5] In view of the need to prevent the inevitable discovery exception from swallowing the exclusionary rule, special care is required on the part of a district court when the government relies on the subpoena power. While we decline to draw a bright line, it is essential that there be a substantial degree of directness in the government's chain of discovery argument, rather than a hypothesized "leapfrogging" from one subpoena recipient to the next until the piece of evidence is reached. Further, the government must show that

both issuance of the subpoena, and a response to the subpoena producing the evidence in question, were inevitable. Particular care is appropriate where, as here, subpoenas are issued after or at the time of the unlawful search, an issue that *Roberts* did not present. We share the Ninth Circuit's view that subpoenas must not serve as an after the fact "insurance policy" to "validate" an unlawful search under the inevitable discovery doctrine. *See Center Art Galleries*, 875 F.2d at 755.

III. Particularized Findings Required on Remand

[6] As the previous discussion of *Nix* and other inevitable discovery cases indicates, inevitable discovery analysis logically must begin with the progress of the investigation at the time of the government misconduct. This point of departure is fixed by the requirement that an inevitable discovery inquiry focus on "demonstrated historical facts" so as to keep speculation to an absolute minimum, *see Nix*, 467 U.S. at 444 n. 5, 104 S.Ct. at 2509 n. 5, although by its nature inevitable discovery analysis inevitably involves some degree of speculation. The exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred.

Our initial concern is the possibility that the government's tax evasion investigation was not sufficiently active or developed prior to the search of Eng's safe to support the government's broad claim of inevitable discovery. Only a few months passed from the beginning of Interdonato's investigation until the search of Eng's safe. Many important sources of evidence were not sought out until after the search of Eng's safe, and Interdonato's information prior to the search of the safe was not very detailed or comprehen-

sive in relation to what later was admitted against Eng. The search of the safe provided a great deal of specific financial information about Eng, and only thereafter was the indictment amended to include tax evasion.

We have suggested that investigations "trigger[ed]" or "catalyzed" by information unlawfully gained become tainted. *See United States v. Falley*, 489 F.2d 33, 41 (2d Cir.1973); *United States v. Cole*, 463 F.2d 163, 173-74 (2d Cir.), *cert. denied*, 409 U.S. 942, 93 S.Ct. 238, 34 L.Ed.2d 193 (1972). Similarly, in *Pimentel*, we took specific note that the audit of the contractor's files was active and ongoing at the time of the government misconduct in that case, and declined to adopt a "flexible test" allowing the government to meet its burden of proof without showing that an "alternate line of investigation [was] being actively sought or pursued at the time of the government misconduct." *Pimentel*, 810 F.2d at 369. We agree with the Fifth Circuit's observation that:

> [T]he alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized. If the inevitable discovery exception can be applied only on the basis of the [government's] mere intention to use legal means subsequently, the focus of the inquiry would hardly be on historical fact.

United States v. Cherry, 759 F.2d 1196, 1205 n. 10 (5th Cir.1985), *cert. denied*, 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987).

The government claims that pursuit of most sources deliberately was delayed until after Eng's arrest so as not to alert Eng, and that pre-search subpoenas were issued only

when the government was certain that the subpoena recipient would maintain the matter in confidence. However, there is no obvious reason why Bowery Bank, subpoenaed prior to the unlawful search for Eng's personal account records, would have been more likely to maintain confidence than the other commercial banks subpoenaed after Eng's arrest for the same type of records. Moreover, it is not apparent why National Westminster Bank, which was subpoenaed prior to the search for Chinese Moon records but after the search for Eng's personal account records, would have been better able to keep the first subpoena in confidence than the second. It also appears that some weeks passed between the search of the safe and the issuance of some of the subpoenas. Delays of this kind are not fully consistent with the suggestion that the government was informed and ready to move as soon as Eng was arrested and the risk of flight removed.

If the evidence demonstrates that an active and ongoing investigation of Eng of the kind we have required was in progress at the time of unlawful search, the district court's next task must be to consider each piece of evidence challenged by Eng and claimed by the government to be admissible under the inevitable discovery exception. The district court must, for each particular piece of evidence, specifically analyze and explain how, if at all, discovery of that piece of evidence "would have been" more likely than not "inevitable" absent the search of Eng's safe, *see Nix,* 467 U.S. at 444, 104 S.Ct. at 2509. This task requires the district court to determine what *would have happened* had the government misconduct never occurred, in light of what the government knew and was pursuing at the moment before the unlawful search, and other relevant facts and circumstances.

That a piece of evidence in fact was found after the search of Eng's safe does not necessarily indicate that its discovery was inevitable at the time of the search. *Cf. Wong Sun*, 371 U.S. at 484, 83 S.Ct. at 415 (rejecting proposition "that a search unlawful at its inception may be validated by what it turns up") (citations omitted). Similarly, Interdonato's testimony as to what he would have done or how he would have behaved, while deserving of careful consideration as part of the analysis, is not necessarily conclusive on the question of whether a particular piece of evidence inevitably would have been found through lawful means had Eng's safe never been searched, or even on subsidiary questions such as whether a subpoena would have been issued and what evidence the subpoena would have produced. An objective analysis is required.

As we indicated, we are unable fully to consider the issues presented in this case because the specific reasoning behind the district court's belief that every item of challenged evidence was admissible under the inevitable discovery doctrine is unknown. In this connection, we set forth some of our concerns as they relate to specific assets:

A. *Eng's Personal Book Accounts*

Prior to the search of Eng's safe, Interdonato had only the names of the banks at which Eng had personal accounts. The search of the safe provided the account numbers presumably used in Interdonato's post-search subpoenas. An important question is to what extent possession of an account number makes more likely a satisfactory response to a bank subpoena, a point on which Interdonato's testimony appears to be contradictory. We note that Bowery Bank, the only bank subpoenaed for personal account records prior to the search

of Eng's safe, returned its subpoena without producing any information.

B. *134 Gauldy Avenue*

With respect to the customer records of the money orders used by Eng to pay Long Island Savings Bank, the mortgagee of the 134 Gauldy Avenue property, the government's chain of inevitable discovery appears to be as follows: Eng's bank account records showed that Eng was not paying the mortgage from his checking accounts; Interdonato had confidential information prior to the unlawful search that Eng was using money orders to pay many expenses; and therefore discovery of the money orders was inevitable because the government's next step in light of this information would have been to obtain the Long Island Savings Bank's deposit items, presumably by subpoena, which would have turned up the money orders. However, this chain of reasoning presumes that lawful discovery of the bank account records themselves was inevitable, a point which is not all that clear. Additionally, Interdonato's testimony is conflicting as to whether he had information prior to the search of the safe that Eng was using money orders to pay for expenses.

Interdonato seems to indicate in his testimony that in order to discovery money orders such as those used by Eng to pay Long Island Savings Bank, one must know where and on what date the money orders were deposited after receipt by the payee. The record is unclear as to whether Interdonato possessed, or specifically how he would have acquired, any of this information (if indeed it is important) with respect to the money orders used by Eng to pay Long Island Savings Bank. Indeed, similar questions seem to exist

with respect to discovery of all the various money orders admitted against Eng.

C. *141 Division Street*

Interdonato's only pre-search knowledge of the 141 Division Street condo came from a confidential source. It is not clear whether Interdonato would have taken action solely on the basis of his pre-search information, for it appears that this information was not even written down by Interdonato. Only the bank records and the condominium unit number found in the safe confirmed that Eng owned the property in the first instance. Further, if a unit number is required in a title search, then it will be more difficult for the government to establish inevitable discovery of the condominium evidence. Interdonato testified he would have gone to the building and asked which unit belonged to Eng, but it is uncertain whether this method of discovery rests on demonstrated facts capable of ready verification.

D. *26 Bowery, Chinese Moon and World Express*

While significant information about the 26 Bowery building was known prior to the unlawful search—Eng's interest in the building (through Bowery Mansion), the selling corporation (26 Bowery Corp.), the name of the seller's attorney (Ronald De Petris) and the names of Eng's attorneys—it was the search of the safe that revealed the names of the owners of 26 Bowery Corp., Sol Leitner and Frieda Grant. The important evidence admitted at trial concerned closing information on the price paid and amount borrowed by Eng to purchase the 26 Bowery building. At least some of the closing information admitted at trial may have been provided only by Leitner and Grant. To the extent

that Leitner and Grant were the source of the closing information, inevitable discovery of the evidence in their possession becomes more difficult to prove because their identities were discovered in the search of the safe, and alternate routes to discovery of these parties may be attenuated.

Interdonato knew prior to the unlawful search that a series of cashier's checks issued by Hang Seng Bank had been deposited into Chinese Moon's National Westminster Bank account. After the arrest of Eng, Interdonato subpoenaed Hang Seng Bank, and discovered a variety of records admitted at trial showing that these cashier's checks originated from parties in Hong Kong. Subject to the district court's fact finding, this seems to us a convincing showing of inevitable discovery of the records in question. Interdonato had detailed knowledge of fund transfers, rooted in pre-search events, and the only step that remained to discovery was issuance of a subpoena for the types of records Hang Seng Bank probably would produce.

It appears that Interdonato first learned of the existence of World Express from the National Westminster Bank checkbook discovered in Eng's safe. After the search, National Westminster Bank was subpoenaed, and a series of cashier's checks and wire transfer deposits into the World Express account discovered. The banks from which the funds originated—Wing Lung Bank, Kwantung Bank, and BCCI—then were subpoenaed, leading to the discovery of additional evidence admitted against Eng. It is possible that discovery of the mere existence of World Express was inevitable. Wang F. Luk, the accountant, and Frank Lam, the attorney, both of whom apparently had some information on World Express, were known to the government prior to the search. However, a case for inevitable discovery of the information produced by Wing Lung Bank, Kwantung Bank, and BCCI

would appear to involve a far more attenuated chain of events.

E. *The Florida Properties*

The only connection between Interdonato and the Florida properties evident in the record is that provided by the documents found in the safe. Those documents identified the address of the house and Eng's ownership of the boat, apparently facilitating a title search and further subpoenas, all of which led to discovery of the evidence admitted at trial. If our understanding of the record is confirmed by the district court on remand, then it will be difficult for the government to meet its burden of proving inevitable discovery of the Florida properties. The government urges that Interdonato inevitably would have found the boat regardless of the search of the safe, because the Florida house had a marina. This argument is inadequate if the search of the safe revealed to the government for the first time that Eng had a house in Florida, and no other convincing connection to the house can be established.

CONCLUSION

The judgment of conviction is vacated and the case is remanded for particularized findings, consistent with the foregoing, supporting the district court's conclusion and the challenged evidence inevitably would have been discovered. This panel will retain jurisdiction of the appeal pending completion of the findings hereby directed and the return of same to this Court.

APPENDIX B—Memorandum and Order of United States District Court for the Eastern District of New York, Decided March 31, 1993.

819 F.Supp 1198 (E.D.N.Y 1993)

UNITED STATES of America, Plaintiff

v.

Shu Yan ENG, also known
as Ah Shu, Defendant.

No. CR-89-678.

United States District Court,
E.D. New York.

March 31, 1993.

The defendant was convicted in the District Court, of tax evasion, and he appealed. The Court of Appeals, 971 F.2d 854, vacated and remanded for particularized findings as to the manner in which, if at all, each piece of evidence challenged by defendant and claimed by government to be admissible under inevitable discovery exception would have been inevitably discovered. The District Court, Glasser, J., held that evidence supported determination that majority of documents seized as result of illegal search of defendant's safe would have inevitably been discovered by lawful means in course of government's tax evasion investigation; thus, such evidence was admissible pursuant to inevitable discovery exception to exclusionary rule.

Motion to suppress denied.

1. Criminal Law 394.1(3)

Inevitable discovery exception to exclusionary rule allows admission of unlawfully obtained evidence at trial when government demonstrates that discovery of that evidence by legitimate means was inevitable. U.S.C.A. Const.Amend. 4.

2. Criminal Law 394.1(3)

Overriding concern in application of inevitable discovery exception to exclusionary rule is that court must balance the exclusionary rule's deterrence rationale against equally compelling public interest in having juries receive all probative evidence of a crime that was validly and constitutionally obtained. U.S.C.A. Const.Amend. 4.

3. Criminal Law 394.1(3)

"Inevitable discovery" doctrine, although unquestionably subjective to some degree, requires avoidance of speculation to the extent possible. U.S.C.A. Const.Amend. 4.

4. Internal Revenue 5291.1

Government burden of proof in establishing prima facie case of tax evasion using expenditures method is heavy one.

5. Internal Revenue 5299

Evidence established that Internal Revenue Service agents' illegal search of safe at one of defendant's businesses did not "trigger" or "catalyze" tax evasion investigation of defendant, but rather that tax investigation was active and ongoing at same time as narcotics and money laundering investigations.

6. Criminal Law 394.1(3)

For purposes of determining whether government would have inevitably discovered evidence independently of illegal search, evidence established that although tax evasion investigation of defendant was still in its formative stages when the illegal search occurred, the government's motivation to pursue that investigation was compelling. U.S.C.A. Const.Amend. 4.

7. Criminal Law 394.1(3)

In view of subpoenas issued to defendant's accountant to obtain defendant's personal tax returns and references therein to defendant's bank accounts, evidence established that there would have been inevitable discovery of the bank accounts independently of evidence obtained in illegal search of safe at one of defendant's businesses. U.S.C.A. Const.Amend. 4.

8. Criminal Law 394.1(3)

In view of defendant's possession on his person of charge cards at time of his arrest, the government would inevitably discover bills and records for the cards independently of postarrest illegal search of safe at one of defendant's businesses. U.S.C.A. Const.Amend. 4.

9. Criminal Law 394.1(3)

Information given to Internal Revenue Service Agent by confidential source that defendant was using money orders to pay for various expenses established that government would have inevitably discovered information concerning the money orders independently of illegal search of safe at one of defendant's bussinesses. U.S.C.A. Const.Amend. 4.

10. Criminal Law 394.1(3)

Evidence established that information obtained by Internal Revenue Service agent from confidential informant prior to illegal search of safe at one of defendant's businesses would have led to inevitably discovery of defendant's ownership of condominium unit; agent's investigation of possible tax evasion would have led to title search that would have revealed defendant's ownership. U.S.C.A. Const. Amend. 4.

11. Criminal Law 394.1(3)

Evidence as to title search of building, Internal Revenue Service agent's request from state of certificate of incorporation for corporate owner of building and information as

to identity of corporate attorneys, who were also defendant's attorneys, established that government would have made inevitable discovery of defendant's interest in building independently of information obtained in illegal search of safe at one of defendant's businesses. U.S.C.A. Const.Amend. 4.

12. Criminal Law 394.1(3)

Evidence consisting of bank records, applications for cashier's checks and documents received from several sources, established that Internal Revenue Service agent had knowledge of existence of several of defendant's businesses prior to illegal search of safe at one of the businesses and thus that "inevitable discovery" exception to exclusionary rule applied to information concerning existence of the businesses. U.S.C.A. Const.Amend. 4.

13. Criminal Law 394.1(3)

Information and evidence obtained by Internal Revenue Service agent during course of tax evasion investigation prior to illegal search of safe at one of defendant's businesses established that there would have been inevitable discovery of defendant's payments for life and automobile insurance, telephone bills and purchase and registration of automobiles. U.S.C.A. Const.Amend. 4.

14. Criminal Law 394.1(3), 1169.1(8)

Evidence in possession of Internal Revenue Service piror to illegal search of safe at one of defendant's businesses was not sufficient to establish that there would have been inevi-

table discovery of defendant's ownership of certain Florida property independenly of information obtained as result of illegal search; however, introduction of the evidence at trial was harmless in view of overwhelming evidence of defendant's guilt of tax evasion. U.S.C.A. Const.Amend. 4.

Patricia Pileggi, Asst. U.S. Atty., Brooklyn, NY, for plaintiff.

Margaret E. Alverson, Peluso Touger and Alverson, New York City, for defendant.

MEMORANDUM AND ORDER

GLASSER, District Judge:

On March 26, 1991, this court denied defendant Shu Yan Eng's motion to suppress certain illegally seized financial records on the ground that the challenged evidence fell within the "inevitable discovery" exception to the exclusionary rule enuncianted by the Supreme Court in *Nix v. Williams*, 467 U.S. 431, 104, S.Ct. 2501, 81 L.Ed.2d 377 (1984). After conviction for tax evasion, defendant appealed this court's denial of his motion to the Second Circuit. In an order dated July 28, 1992, the court of appeals vacated the suppression ruling and remanded the case for "particularized findings" as to how discovery of "each piece of evidence challenged by Eng and claimed by the government to be admissible" " 'would have been' more likely than not 'inevitable' absent the search of Eng's safe." *United States v. Eng*, 971 F.2d 854, 862 (2d Cir. 1992). Those "particularized findings" are provided, and this court reaffirms its initial conclusion that the majority of evidence challenged

by defendant Eng fell within the parameters of *Nix v. Williams* and its progeny. Recognizing that the government failed to satisfy its burden of proof as to some of the evidence admitted at trial, this court nevertheless finds that the paucity of evidence incorrectly presented to the jury would not have changed the trial outcome and therefore constituted harmless error.

FACTS

The Second Circuit opinion in this case, *United States v. Eng*, 971 F.2d 854 (2d Cir. 1992), sets forth the pertinent facts leading up to and following defendant's arrest and conviction, and familiarity with that decision is presumed. However, in order to memorialize the detailed exposition necessitated by the Second Circuit's vacatur and remand, this court includes in this opinion such other information as was relevant to its determination that the government ultimately would have discovered, by lawful means, the evidence challenged by Eng. In addition, where appropriate, inaccuracies and additions to the factual analysis reflected in the opinion of the court of appeals are included. The discussion and conclusions which follow rest on this court's observation of Agent Interdonato's demeanor, or an assessment of his testimony at the suppression hearing, and on a close examination of the transcript and exhibits from that hearing.[1]

In February of 1989, the Drug Enforcement Administration ("DEA") and the Internal Revenue Service ("IRS") began investigating Shu Yan Eng for violations of various narcotics and money laundering statutes. Information from

[1]References to the suppression hearing transcript are denoted "*Tr.*"; exhibits from that hearing and from trial are denoted "GX" for government's exhibit and "DX" for defense exhibits.

confidential informants that Eng was importing large quantities of narcotics from the Far East and laundering the money from this narcotics trade through various businesses and properties in the United States provided the impetus for these initial investigations. Several months later—in August or September of 1989—the IRS commenced a tax evasion investigation of Eng. *Tr. at 78.* Although tax investigations customarily follow commencement of narcotics and money laundering investigations, *Eng*, 971 F.2d at 856, in this case the "precipitating fact" that led the government to delve into defendant's tax activity was Eng's purchase of a building at 26 Bowery on behalf of a corporation over which he presided. *Tr.* at 78-79. IRS Special Agent Thomas Interdonato, assigned to the DEA Southeast Asian Task Force, discovered Eng's purchase of this property through an examination of public records in the summer of 1989; Interdonato thereafter took primary responsibility for the tax investigation. *Tr.* at 78-79.

In conducting this tax evasion investigation of Shu Yan Eng, Interdonato used the "tax expenditures" method of proof, which essentially compares the taxpayer's income and non-taxable resources, such as gifts and loans, with the taxpayer's expenditures. *Tr.* at 3-4. In order to prove tax evasion by this indirect method, the government must show to a "reasonable probability" that non-taxable sources of funds spent by the taxpayer did not exist, a burden that involves a "thorough search of assets, sources of money, and cash inflows and outflows." *Eng*, 971 F.2d at 856 (*citing United States v. Bianco*, 534 F.2d 501 (2d Cir.), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976)). The materials that Interdonato gathered in connection with the initial phase of his investigation are discussed in detail below.

On October 18, 1989, Eng was arrested pursuant to a grand jury indictment charging him with administration of a continuing criminal enterprise, money laundering, and various narcotics violations. Lawfully seized from Eng's person at the time of his arrest were American Express Cards, three vehicle registrations, a social security card, a life insurance card, a driver's license, and several business cards. *Tr.* at 177; GX 357. In addition, on the day of defendant's arrest, law enforcement authorities took possession of two of his business properties: the 26 Bowery building, mentioned above as the impetus for the tax investigation, and the French Ice Cream Parlor. A search of Eng's personal safe in the French Ice cream parlor ensued, and a variety of materials—also discussed below—were seized from that safe. The government concedes that the search and seizure of the safe were conducted without a warrant and were thus unlawful. *Tr.* at 184.

In April of 1990, approximately six months after the illegal search and eight months after Interdonato's tax evasion investigation commenced, a superseding indictment was handed up. That indictment added to the existing charges against Eng three tax evasion counts relating to the tax years 1986 through 1988. Eng then moved to suppress various financial documents seized in the search of the French Ice Cream Parlor safe and evidence allegedly derived from the seized materials, contending that this evidence was tainted by the illegal search and therefore could not be admitted at trial to support the tax evasion counts. After holding a suppression hearing, at which Agent Interdonato was the only witness, reading the parties' briefs and proposed findings of fact, and examining *Nix v. Williams* and its progeny, this cout determined that the government had met its burden of proof under the "inevitable discovery" doctrine by demonstrating that it was more likely than

not that the government would have discovered the challenged evidence even absent the illegal search. Defendant's motion to suppress was therefore denied, and, as expected, the government introduced many of the challenged documents into evidence at Eng's trial.

In April of 1991, a jury convicted Eng on all three tax evasion charges but acquitted him on all other counts. Eng thereafter appealed this court's suppressio ruling to the Second Circuit which, as already mentioned, vacated the determination that the inevitable discovery doctrine applied generally to all the seized evidence and remanded the case for particularized findings of fact. The remainder of this opinion complies with that remand as follows: first, it discusses the relevant "inevitable discovery" law in the Second Circuit; second, it explains how the inevitable discovery doctrine relates to the particular investigation against Eng; third, it describes the evidence that the government presented at trial to support Eng's conviction on tax evasion; and fourth, it analyzes in detail each of the challenged pieces of evidence—in accordance with the Second Circuit's mandate—to explain why the majority of that evidence falls within the inevitable discovery exception to the exclusionary rule.

DISCUSSION

I. The Inevitable Discovery Doctrine

A. *Nix v. Williams*

"The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, *Weeks v. United States*, 232 U.S. 383 [34 S.Ct. 341, 58 L.Ed. 652] (1914), and of testimony concerning knowl-

edge acquired during an unlawful search, *Silverman v. United States*, 365 U.S. 505 [81 S.Ct. 679, 5 L.Ed.2d 734] (1961)." *Murray v. United States*, 487 U.S. 533, 536, 108 S.Ct. 2529, 2532, 101 L.Ed.2d 472 (1988). In the oft-quoted words of *Wong Sun v. United States*, 371 U.S. 471, 484-84, 83 S.Ct. 407, 414-15, 9 L.Ed.2d 441 (1963), the exclusionary rules also bars introduction of derivative evidence—"fruit of the poisonous tree"—unless the relationship between the evidence and the search is sufficiently attenuated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

Id. at 487-88, 83 S.Ct. at 417-18. The rationale of the inevitable discovery doctrine evolved from this quotation. *See Nix v. Williams*, 467 U.S. 441-43, 104 S.Ct. 2501, 2507-09, 81 L.Ed.2d 377 (1984); *see also United States v. Alvarez-Porras*, 643 F.2d 54, 59 (2d Cir.) (citing language from *Wong Sun* and explaining that "[i]n applying the exclusionary rule, a trial court must focus on the existence of 'exploitation' of the 'primary illegality.' '[T]he primary issue [is] whether the unlawful police behavior bore a causal relationship to the acquisition of the challenged testimony.' . . . Even if 'the challenged evidence was acquired by the police *after* some initial Fourth Amendment violation, . . . the question before the court is whether the chain

of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the "taint" imposed upon that evidence by the original illegality.' ") (citations omitted) (emphasis in original), *cert. denied*, 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d 121 (1981); *United States v. Falley*, 489 F.2d 33, 40-41 (2d Cir. 1973) (citing language from *Wong Sun* to hold "[i]t would have been only a question of time before the government by a so-called saturation investigation, or otherwise, would have discovered the . . . documents. Even if the address book had shortened or facilitated the investigation it did not supply fruit sufficiently poisonous to be fatal.").

[1] The inevitable discovery exception to the exclusionary rule allows admission of unlawfully obtained evidence at trial when the government demonstrates that discovery of that evidence by legitimate means was "inevitable." *Nix*, 467 U.S. at 444, 104 S.Ct. at 2509; *United States v. Gorski*, 852 F.2d 692, 695 (2d Cir.1988). Illustration of what has been deemed "inevitable" is essential to comprehending and applying the doctrine. In the seminal Supreme Court case on inevitable discovery, *Nix v. Williams*, police officers elicited incriminating statements from the defendant which, in turn, led them to the body of his murder victim, a ten-year-old girl named Pamela Powers. Although an earlier Supreme Court appeal found the defendant's admissions to be the product of unconstitutional custodial interrogation, the *Nix* court nevertheless held that evidence of the location and condition of the girl's body was properly admitted at defendant's retrial. *Id.* 467 U.S. at 449-50, 104 S.Ct. at 2511-12. The basis for this holding was the Court's conclusion that police "inevitably" or "ultimately" would have discovered the victim's body even absent the unconstitu-

tional conduct: a search had been in progress and was suspended only when defendant agreed to cooperate; the area was systematically divided or intended to be divided; and search-team members were three to five hours from the body's location when the search was suspended. *Id.* at 448-49 S.Ct. at 2511-12.

The *Nix* Court explained the rationale underlying the inevitable discovery doctrine as follows:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position than they would have been in if no police error or misconduct had occurred.

Id. at 443-444, 104 S.Ct. at 2508-09 (emphasis in original). In other words, "[t]he purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." *Id.* at 443 n. 4, 104 S.Ct. at 2509 n.4. Relying on the observation that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment," and declining "to impose added burden on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries," the *Nix* Court rejected defendant's argument that the clear-and-convincing evidence standard was appropriate. *Id.* at 444-45 n. 5, 104 S.Ct. at 2509-10 n. 5. Rather, it held that the prosecution must establish inevitable discovery by a preponderance of the evidence in order for the exception to apply. *Id.* at 444, 104 S.Ct. at 2509.

B. *Nix's Second Circuit Precursors and Progeny*

[2] Nix v. Williams was important in that it signalled acceptance of a widely recognized exception to the exclusionary rule, 467 U.S. at 440 n. 2, 104 S.Ct. at 2507 n. 2, but the opinion failed to define the precise contours of the inevitability doctrine. *United States v. Cherry,* 759 F.2d 1196, 1204 (5th Cir.1985), *cert. denied*, 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984), *cert. denied,* 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985). Recognizing the need to refine the meaning of "inevitable," many courts have looked not only to the Supreme Court case but also to consistent precedent from their circuits. *See, e.g. United States v. Pimentel,* 810 F.2d 366, 369 (2d Cir.1987); *Cherry*, 759 F.2d at 1204; *Satterfield*, 743 F.2d at 846. Six inevitable discovery cases from the Second Circuit—leading up to *United States v. Eng*—help demonstrate the scope and nature of the inevitability doctrine in this circuit. Although none of these cases addresses the analysis appropriate to the particular type of action against *Eng,* they do illustrate the tenacity of the *Nix* Court's overriding concern: that in each case, a court must balance the exclusionary rule's deterrence rationale against an equally compelling public interest in having "juries receive all probative evidence of a crime" that was validly and constitutionally obtained. *See Nix,* 467, U.S. at 443-44, 104 S.Ct. at 2508-09; *Murray,* 487 U.S. at 539-41, 108 S.Ct. at 2534-35.

An examination of *United States v. Alvarez-Porras*, 643 F.2d 54, 59 (2d Cir.), *cert. denied,* 454 U.S. 839, 102 S.Ct. 146, 70 L.Ed.2d 121 (1981), a pre-*Nix* inevitable discovery case from this circuit, is an apt place to begin; although the facts of that case are quite distinct from those before this court, *Alvarez-Porras* discusses the inevitable discovery

doctrine in depth and provides a terse and eloquent summary of relevant precedent from the Second Circuit. Defendants in *Alvarez-Porras*, convicted of conspiring to import and distribute substantial quantities of cocaine, challenged the seizure of incriminating evidence as unconstitutional because it occurred prior to the magistrate having signed the search warrant, although after the officers had applied for that warrant. *Id.* at 58-59. Thus, as in many of the later cases discussed below, *Alvarez-Porras* involved a search at a time when the issuance of a warrant was imminent.

The Second Circuit explained the three related exceptions to the exclusionary rule—attenuation, independent source, and inevitable discovery—as follows:

> Each of these exceptions rests, most basically, on the lack of a sufficiently close connection between the state's wrongdoing and the invasion of the defendant's privacy. Furthermore, despite the identification of discrete headings for the various exceptions, their applications and rationales overlap enough that we view them more as helpful guides than as rigid tests. *In each case, we must weigh the extent of any illegality, the probative value of any legally obtained information, and the relationship between the two, always with the hope of vigorously enforcing the Fourth Amendment without imposing ineffective constraints on criminal investigations.* . . . In this complicated area, it is wise[ ] to let the cases speak for themselves and to encourage careful analysis and argument rather than to endorse vague headings which add little to our understanding of the problems

> and which, because of their symbolic impact, may lead inadvertently to a weakening of the Fourth Amendment's protection.

Id. at 60 (emphasis added). Reviewing and comparing the pertinent caselaw from the circuit,[2] *id.* at 60-63, the court cautioned that the precedent should not be read to invite speculation as to a search's probable results:

> [Expansively interpreted, the cases above suggest] a broad inevitable-discovery exception whenever a court is satisfied that any government illegality was not the but-for cause of the discovery of any incriminating evidence. In many cases, dictum about a general but-for exception—based on the Supreme Court's phrase in *Wong Sun v. United States, supra,*

[2]*E.g., United States v. Marchand,* 564 F.2d 983, 992 (2d Cir.1977) (holding arrest pursuant to validly issued and executed warrant not invalidated by minor interceding element of illegal police behavior), *cert. denied,* 434 U.S. 1015, 98 S.Ct. 732, 54 L.Ed.2d 760 (1978); *United States v. Galante,* 547 F.2d 733, 741-42 (2d Cir.1976) (finding that illegal search which led to co-conspirator's cooperation did not taint subsequently seized evidence since "the seizure of the [goods] . . . was the product of Cohen's voluntary cooperation" which "broke the chain of causation"), *cert. denied,* 431 U.S. 969, 97 S.Ct. 2930, 53 L.Ed.2d 1066 (1977); *Falley,* 489 F.2d at 40 (rejecting claim that illegal search of defendants' home and illegal seizure of address book containing customs' broker's name mandated reversal of defendants' conviction on narcotics smuggling charges because "[e]ven if the address book had shortened or facilitated the investigation, it did not supply fruit sufficiently poisonous to be fatal."); *United States v. Cole,* 463 F.2d 163 (2d Cir.) (finding IRS's "saturation investigation" of defendant's agency to be sufficiently distinct from illegal FBI wiretap so as not to require reversal because "[c]onduct is not the legal cause of an event if the event would have occurred without it."), *cert. denied,* 409 U.S. 942, 93 S.Ct. 238, 34 L.Ed.2d 193 (1972).

> 371 U.S. at 487, 83 S.Ct. at 417—will not change the result because the related, but separable, independent-source exception also applies. But the difference between the doctrines is crucial. The independent-source exception requires a showing that, even if the constable blundered once, he has taken enough proper steps that his lawful investigation is not thereby invalidated. A broad but-for exception, on the other hand, encourages speculation on whether a blunderbuss constable *might* eventually have developed a lawful basis for his investigation. A judge would have to conjecture about what the police would have done, or might have done, or could conceivably have done, in deciding whether illegal conduct which led to incriminating evidence was the but-for cause of the seizure. . . . At its furthest and most troubling extension, a but-for exception could be used to justify searches simply on the basis of probable cause and reasonableness, without regard for the warrant requirement, because the officers conducting the search were correct in believing they had a lawful basis for the search. . . . [W]e will not risk the whittling down of the warrant requirement, without regard for compelling circumstances vel non, by justifying the admission of evidence under a broad inevitable discovery exception to the exclusionary rule.

Id. at 63-64. Nevertheless, the *Alvarez-Porras* court declined to suppress the challenged evidence in the case before it because "suppressing the evidence seized would not serve the deterrent purposes of the exclusionary rule." *Id.* at 65-66.

The next pre-*Nix* case that is useful in defining the reasoning and boundaries of the inevitable discovery doctrine is *United States v. Fisher,* 700 F.2d 780 (2d Cir.1983). In that case, Howard Fisher, a convicted felon, purchased assorted handguns by posing as someone named Howard Ashe. After Fisher was convicted for violating the Federal Firearms Act, he appealed, claiming that admissions he made to Graham, a state investigator, were obtained in violation of his fifth amendment right against compelled self-incrimination. Noting that defendant's statements were never introduced into evidence at trial, the Second Circuit proceeded to analyze the effect that those statements had on the evidence that actually formed the basis for his conviction. *Id.* at 784. The factual link was as follows: Graham forwarded defendant's statements to Agent Varriale of the Federal Bureau of Alcohol Tobacco and Firearms (ATF), who was investigating whether there existed a "radical" source of guns used by criminals shooting police officers, *id.* at 782; based on defendant's statements, Varriale recalled an earlier report concerning a gun purchase by someone named Howard Ashe, *id.* at 784; the ATF agent thereupon initiated his own investigation of Fisher, *id.;* several days later, Fisher was again arrested for gun possession, this time at the New York/Canadian border. *Id.*

Citing *United States v. Crews,* 445 U.S. 463, 470, 100 S.Ct. 1244, 1249, 63 L.Ed.2d 537 (1980), *Alvarez-Porras, Falley,* and *Cole,* the Second Circuit interpreted the facts of Fisher's case as follows:

> Once Fisher had been arrested, the evidence against him was compiled in a *routine fashion that would inevitably have led to Fisher's discovery.* As Varriale had done in as many as a dozen other Vermont firearms investigations, he asked the major gun

> dealers in Vermont if they had recorded any purchases by Howard Fisher or Howard Ashe. He displayed a concededly appropriate photo spread to the three dealers with such records, two of whom quickly identified Fisher. Thus we agree with the district court which found that the evidence offered by the Government in support of Fisher's conviction was "derived from sources independent, in any event, from the statements made by the defendant to . . . Graham," thereby removing Fisher's statements from the protection of the Fifth Amendment by way of the "inevitable discovery" exception to the exclusionary rule. . . . Because the discovery of Fisher's crimes was inevitable once he was arrested at the border with a gun purchased in Vermont, any assurance he received from Graham becomes irrelevant since it would not have saved Fisher from federal investigation.

Id. at 784 (emphasis added). Thus, in *Fisher,* as in earlier *and* subsequent cases from the Second Circuit, the routine nature of the investigation led the court to determine that illegal evidence inevitably would have been discovered. *Cf. Falley,* 489 F.2d at 41 ("If the evidence produced by the investigation was simply the normal output of that investigation, then the investigative findings have not been tainted directly.").

Following the *Nix* decision, the first case from this circuit to discuss the inevitable discovery doctrine was *United States v. Pimentel,* 810 F.2d 366 (2d Cir.1987). Defendants in that case were indicted for falsifying and concealing material facts from, and making false and fraudulent statements to, the Department of Defense. In connection with this prosecution, the government sought to introduce into

evidence two incriminating letters discovered in the course of a post-contract audit. *Id.* at 367. The district court found that the auditor had violated defendants' constitutional rights by removing these letters from defendants' files without their consent. *Id.* Recognizing the auditor's clear right to examine the letters in the course of his audit, *id.*, the trial court nevertheless held that the inevitable discovery doctrine did not apply to direct but only to indirect products of an illegal search. *Id.* at 368.

The government appealed this ruling, and the Second Circuit reversed, concluding that the ongoing audit "surely would have uncovered the letters at issue," and that the *Nix* Court intended the inevitable discovery doctrine to apply to all products of a search, whether direct or indirect. *Id.* at 369. While recognizing that some of its sister courts had advanced a flexible test for inevitable discovery, the *Pimentel* court found that the facts of the case before it did not necessitate decision on this matter, stating:

> Judge Bownes [of the First Circuit], who wrote the opinion in *[U.S. v.] Silvestri* [787 F.2d 736 (1st Cir.1986)] . . . held that, rather than setting up an "inflexible 'ongoing' test," the "analysis [should] focus on the questions of independence and inevitability and remain flexible enough to handle the many different fact patterns which will be presented." 787 F.2d at 746. Since there is no need to apply Judge Bownes' flexible test to the facts of the instant case, we see no need to reach out and adopt it.

Id. at 369. Instead, the Second Circuit examined whether admitting the letters in evidence would encourage fourth amendment abuse and determined, finally, that no such result would ensue. *Id.* (refusing to " 'place an incommen-

surate burden on the government, unnecessary for the protection of commercial privacy' " that might " 'invit[e] seizure on the chance that it could arguably be converted into an effective vaccination against any future use of such routine records.' ") (*quoting McGarry v. United States*, 388 F.2d 862, 871 (1st Cir.1967).

The next post-*Nix* Second Circuit case to discuss inevitable discovery was *United States v. Whitehorn*, 829 F.2d 1225 (2d Cir. 1987), *cert. denied*, 487 U.S. 1237, 108 S.Ct. 2907, 101 L.Ed.2d 939 (1988). In *Whitehorn*, three agents entered defendant's apartment upon just cause, arrested her, and conducted an initial security check of the location which uncovered nothing of evidentiary value. *Id.* at 1227-28. Two of those agents then took Whitehorn to the local FBI office where other officers were preparing an affidavit to obtain a search warrant of her apartment. *Id.* Concern that defendant had triggered an explosive device—stemming from her organization's past terrorist activities—led the officers who had departed from the apartment to request a bomb sweep; despite the supposed urgency of this situation, none of the neighbors were alerted to potential danger and the bomb expert did not arrive for 45 minutes. *Id.* at 1228. When the expert arrived, he and another officer "proceeded to look through every container and envelope" in the apartment, uncovering guns, timing mechanisms, equipment used to make false drivers' licenses and blank social security cards. *Id.* Any evidence of criminality observed during this search was then reported to the agents swearing out the search warrant. *Id.*

Defendant moved to suppress the evidence—including her passport and driver's license—discovered in this warrantless "bomb sweep." *Id.* at 1228-29. The government conceded the illegality of the search but cited the inevitable discovery doctrine as an excuse. *Id.* at 1229. In response,

defendant acknowledged that all of the challenged evidence would have been discovered in the subsequent warranted search but argued that the search was tainted by the overbroad warrant. *Id.* The district court denied defendant's motion to suppress, *id.* at 1229-30, and the Second Circuit, after explaining the rationale of *Nix v. Williams*, affirmed as follows:

> We . . . agree with Judge Conner that the requirement of the exception—that the challenged evidence would inevitably have been discovered by lawful means—was met. Agents at the F.B.I. office actually began the warrant application process over an hour before the illegal bomb sweep of Whitehorn's apartment occurred. They had already pinpointed the apartment to be searched. Through interviews with neighbors as well as prior extensive investigation, they knew that two of the apartment's occupants . . . had a history of trafficking in false identification documents, weapons, and explosives. . . . In short, the agents had overwhelming probable cause before the bomb sweep to search the apartment in the belief that it was being used, in Judge Conner's words, as a "safe house" for federal fugitives in which false identification documents and other types of information detected by the bomb sweep reasonably could be expected to be found. Under these circumstances, and given that the agents were then proceeding to secure a warrant which specifically authorized the seizure of the challenged evidence, we conclude that the district court properly denied Whitehorn's motion to suppress the evidence first detected by the bomb sweep.

Id. at 1231. Relying on this court's opinion in *United States v. Levasseur,* 620 F.Supp. 624 (E.D.N.Y.1985), *aff'd on other grounds,* 816 F.2d 37 (2d Cir.1987), the *Whitehorn* court rejected defendant's assertion that inclusion in the warrant affidavit of information from the sweep tainted the entire warrant and all evidence seized as a result of the warrant. *Whitehorn,* 829 F.2d at 1231 (" 'It is well settled that "[t]he ultimate inquiry is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause" ' ") (*quoting Levasseur,* 620 F.Supp. at 631 n. 2 (*quoting United States v. Lace,* 669 F.2d 46, 49 (2d Cir. 1982))).

A third case following *Nix, United States v. Roberts,* 852 F.2d 671 (2d Cir.), *cert. denied,* 488 U.S. 993, 109 S.Ct. 556, 102 L.Ed.2d 583 (1988), posed the question of whether exceptions to the exclusionary rule apply to motions brought under Rule 41(e) of the Federal Rules of Criminal Procedure for return of property unlawfully seized. *Id.* at 675. In *Roberts,* law enforcement authorities seized an enormous quantity of business records pursuant to an overly broad search warrant that was not supported by probable cause. *Id.* at 672-73. The government argued that the inevitable discovery doctrine of *Nix v. Williams* was one of several exceptions to the exclusionary rule that applied to this illegal search. *Id.* at 675-76. More specifically, the government contended that it would have discovered the documents under a subpoena that it had issued several months prior to the search. The Second Circuit held that exclusionary rule exceptions *do* apply to Rule 41(e) motions but disagreed with the government's application of the inevitable discovery doctrine to this case:

> The mere fact that the government serves a subpoena . . . does not mean that it will obtain the documents it requests. A subpoena can be invalid for a variety of reasons, as when it is unduly burdensome, Fed.R.Crim.P. 17(c), when it violates the right against self-incrimination, *United States v. Doe*, 465 U.S. 605, 610-12, 104 S.Ct. 1237, 1241-42, 79 L.Ed.2d 552 (1984), or when it calls for privileged documents. *In re Grand Jury Subpoena Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984). Moreover, we can deplore but not ignore the possibility that the recipient of a subpoena may falsely claim to have lost or destroyed the documents called for, or may even deliberately conceal or destroy them after service of the subpoena.

Id. at 676. The *Roberts* court therefore concluded that the government had not demonstrated by a preponderance of the evidence that its subpoena inevitably would have resulted in discovery of the challenged documents. *Id.*

United States v. Gorski, 852 F.2d 692 (2d Cir.1988), was the first of several cases in this circuit to discuss the inevitable discovery doctrine in the context of an inventory search. Based upon confidential information and after a period of surveillance, FBI agents arrested defendant Gorski and searched the bag that he was carrying. Although the agents had probable cause to believe that the bag contained narcotics, they had neither a warrant nor exigent circumstances to justify their immediate search. Defendant moved to suppress the cocaine discovered in the bag, and the district court denied that motion based on its conclusion that an inventory search at the station inevitably would have revealed the evidence that was subject to suppression. *Id.* at 695. The Second Circuit reversed and remanded as follows:

> The finding that [the] search of the bag at the FBI office would inevitably have led to the discovery of the cocaine is clearly correct. However, there was no evidence to support the further necessary finding that it was inevitable that such an inventory search would be conducted. A thorough review of the record reveals no evidence that such searches were an *invariable, routine procedure* in the booking and detention of a suspect at the particular FBI office involved. . . . We therefore have no alternative but to reverse the district court's order denying Gorski's motion to suppress the evidence found in the search of the bag and to remand for an evidentiary hearing on the factual issue whether an inventory search of the bag was a routine procedure incident to booking and detention of a suspect at the FBI office in question.

Id. at 696 (emphasis added); *see also United States v. Jenkins*, 876 F.2d 1085, 1088-89 (2d Cir.1989) ("[A]ssuming that the government could have taken custody of defendant's suitcase and transported it to FBI headquarters, . . . an inventory search, conducted by government agents pursuant to FBI policy, may have been permissible. And this search, in turn, may have satisfied the requirements of the inevitable discovery doctrine . . . [H]owever, . . . before an inventory search is permissible, the government must have

legitimate custody of the property to be inventoried. . . . Here the government has not yet shown any legitimate custody."), *cert. denied*, ____ U.S. ____, 112 S.Ct. 659, 116 L.Ed.2d 751 (1991).[3]

[3] Several observations emerge from this series of Second Circuit inevitable discovery cases. First, while courts are concerned that the inevitable discovery exception not erode the exclusionary rule, they also are reluctant to invalidate legitimate law enforcement activities because some tainted technique intrudes on an otherwise valid investigation. To strike a balance between these competing concerns, courts tend to ask whether the case before them is one in which excluding the challenged evidence would serve the deterrent purpose of the exclusionary rule. Second and related, the inevitable discovery doctrine, although unquestionably subjective to some degree, *Eng*, 971 F.2d at 861, requires avoidance of speculation to the extent possible. Consequently, the doctrine is most willingly applied in two types of cases: first and more commonly, when a valid search is imminent—in other words, officers are in the process of obtaining a warrant; second, when the investigation is one that has routine, established procedures that the officer was in the course of following. As the next section

[3]In addition, there are several recent district court cases applying the inevitable discovery doctrine. *See United States v. Adarkor*, 1992 WL 320590, 1992 U.S. Dist. LEXIS 16316 (S.D.N.Y. 1992) (denying suppression of documentary evidence from unlawful search of apartment because police inevitably would have discovered evidence on second search, conducted pursuant to defendant's consent; court found "substantial basis for seeking defendant's consent" to exist); *United States v. Cabassa*, 782 F.Supp. 226, 230 (S.D.N.Y.1992) (holding that inevitable discovery doctrine applies to unconstitutional search of apartment which revealed drugs and drug paraphernalia because, at time search was conducted, agents had probable cause and were in process of obtaining warrant).

demonstrates, *United States v. Eng*, 971 F.2d 854 (2d Cir.1992), confirms these two observations; however, that case calls upon this court to explain how these observations were properly extended and applied to the particular tax expenditures investigation in question.

C. *The Shu Yan Eng Remand*

In considering the facts of defendant Eng's case, the Second Circuit refined its interpretation of the inevitable discovery doctrine by clarifying the teaching of *Nix* and its progeny in two important ways. First, the *Eng* court explained that *Roberts*, "[c]ontrary to Eng's contention," did not hold that.

> the subpoena power *never* may be relied upon by the government to meet the inevitable discovery burden of proof. . . . The *per se* prohibition urged by Eng would conflict with the Supreme Court's requirement that the exclusionary rule, and the inevitable discovery exception, should not be employed so as to place the government in a worse position than it would have been in had no unlawful search existed.

Id. at 860 (emphasis in original). Cautioning against "hypothesized 'leapfrogging' from one subpoena recipient to the next," the court held that "where the government can demonstrate a substantial and convincing basis for believing that the requisite information would have been obtained by subpoena . . . there is no reason why the government may not rely upon the subpoena power as one way it might meet the burden of proving inevitable discovery by a preponderance of the evidence." *Id.*

Second, the *Eng* court voiced agreement with the Fifth Circuit's observation that " '[t]he alternate means of obtaining the evidence must at least be in existence and, at least to some degree, imminent, if yet unrealized.' " *Id.* at 861 (*quoting Cherry*, 759 F.2d at 1205 n. 10). Summarizing the Second Circuit inevitable discovery cases the *Eng* court observed:

> [T]he facts of cases applying the inevitable discovery doctrine suggest that proof of inevitability *is made more convincing* when the areas of the search or investigation are well-defined, the government effort is planned and methodical, and a direct causal relationship and reasonably close temporal relationship exist between what was known and what had occurred prior to the government misconduct and the allegedly inevitable discovery of the evidence.

Id. at 859 (emphasis added). The *Eng* court did not consider how this observation affects a case which, as a matter of law, requires the government to penetrate defendant's camouflaged financial activity inexcruciating detail. Therefore, before specifically applying the inevitable discovery doctrine to each item of evidence admitted at Eng's trial, it is worthwhile to explain how the theory advanced in this case within the spectrum of inevitable discovery cases described above.

[4] As the Second Circuit acknowledged, the government operates under significant constraints when it attempts to prove a tax evasion case by the expenditures method. *Eng*, 971 F.2d at 856. This method requires the government to amass detailed information concerning all of an accused's expenditures and to conduct a methodical, routine examina-

tion of those expenditures together with any available resources. For example, in *United States v. Mastropieri*, 685 F.2d 776 (2d Cir.), *cert. denied*, 459 U.S. 945, 103 S.Ct. 260, 74 L.Ed.2d 203 (1982), a net worth and expenditures case,[4] defendants challenged the government's tax investigation as insufficient. The government determined defendant's financial position by examining 32 separate bank accounts used by defendants; by canvassing 47 banks, 71 brokerage firms, and 11 lending institutions in the vicinity of defendants' residences; by searching property records in Bronx, Nassau, Queens, Kings and Suffolk Counties; by checking IRS, treasury department and county clerk records; and by interviewing various friends and acquaintances of the defendants. *Id.* at 779. Disagreeing with defendants' claim of insufficiency, the court explained:

> [T]he Government does enough when, as here, it investigates reasonably possible sources of non-taxable income and explores whatever leads the taxpayers or others may proffer. Once it has thus estab-

[4]The basic difference between the "net worth" and the "expenditures" method has been explained as follows:

> The net worth method is used when a taxpayer shows an increase in net worth not derivable from reported income. Since this method "is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before," the cash expenditure method was developed to "reach such a taxpayer by establishing the amount of his purchases of goods and service which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year."

Mastropieri, 685 F.2d at 778 n.2 (*quoting Taglianetti v. United States*, 398 F.2d 558, 562-63 (1st Cir.1968), *aff'd without discussion of this point*, 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302 (1969)).

> lished a *prima facie* case, the taxpayer "remains quiet at his peril."

Id. at 785 (*quoting Holland v. United States*, 348 U.S. 121, 139, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954)); *see also United States v. Koskerides*, 877 F.2d 1129, 1138 (2d Cir.1989) (quoting *Mastropieri* and holding that government meets its burden of proof in tax evasion case when it "investigates reasonably possible sources of non-taxable income and explores whatever leads the taxpayers or others may proffer"); *United States v. Caswell*, 825 F.2d 1228, 1231 (8th Cir.1987) ("Under the 'cash expenditures' method of proof, the government is required to show either a 'likely source' of the allegedly unreported income or that it has negated all reasonably possible nontaxable sources of income."). From these cases, it is clear that the government's burden of proof in establishing a *prima facie* case of tax evasion using the expenditures method is a heavy one.

Time consuming—often extending over many months—an expenditures investigation generally does not have one crucial event establishing criminality; it is the accumulation of evidence of the absence of legitimate sources of income which would normally permit large expenditures that establishes the criminal activity. *See, e.g., Bianco*, 534 F.2d at 504-06 (finding government's investigation sufficiently thorough so as to negate existence of non-taxable funds and uninvestigated leads when investigation included examining probate records and circulating letters to approximately 100 banks, a brokerage house, insurance brokers, doctors, schools, hospitals, the telephone company, the electric company, and an attorney who had performed legal services for defendant); *see also Caswell*, 825 F.2d at 1233 ("extensive investigation of bank records, prior years' tax returns, and the like reveal[ing] no other possible nontaxable sources of

income, other than a cash gift . . . sufficient . . . to allow the jury to infer that there were no other possible sources of income to explain [the defendant's] expenditures"); *United States v. Terrell*, 754 F.2d 1139, 1144-48 (5th Cir.) (in prosecution for tax evasion using "net worth" and "cash-on-hand/expenditures" methods of proof, government satisfied burden of negating non-taxable sources of funds by canvassing public records to determine defendant's holdings, contacting nearly 30 banks, interviewing nearly 300 potential witnesses, questioning third parties involved in transactions with defendant, and tracing all expenditures made by defendant back to their sources to determine how they were purchased), *cert. denied*, 472 U.S. 1029, 105 S.Ct. 3505, 87 L.Ed2d 635 (1985).

Accordingly, when a search occurs in the initial stages of an investigation that necessarily is of such complexity and duration, routine procedures such as those mentioned in *Gorski* and *Fisher* assume heightened significance in determining what *would* have happened in the absence of an illegal search. *Cf. Cole*, 463 F.2d at 174 ("It would be a poor 'saturation investigation' that did not embrace this common method of tax evasion; indeed, one would suppose [that charges for personal expenses] would be among the first items even in an ordinary field audit."). Clearly, obtaining business records, for example, is a recognized investigatory technique in such an investigation. *See McGarry v. United States*, 388 F.2d 862, 867 (1st Cir. 1967) ("To know that records relevant to the status of a business include ledgers, journals, cancelled checks, bank statements, vouchers, corporate minute books, cash receipts and disbursement records, deposit slips . . . is hardly today an occult art. An apprentice investigator would ask for such records."), *cert. denied*, 394 U.S. 921, 89 S.Ct. 1178, 22 L.Ed.2d 455 (1969).

Bearing these principles in mind, this court turns to its assigned task: memorializing in detail its determination that the evidence in this case demonstrated that an active and ongoing investigation of Eng's tax violations was in progress at the time of the unlawful search; and then memorializing in detail why it concluded that each piece of evidence challenged by Eng and claimed by the government to be admissible inevitably would have been discovered absent the search of the French Ice Cream Parlor safe. *Id.* at 862.

II. Inevitable Discover Applied

A. Evidence at Trial

The government's theory of tax evasion at trial was that Eng used money upon which he did not pay taxes to make certain expenditures and acquire certain assets by dealing primarily in money orders. As evidence, the government introduced deposit items from bank accounts of individuals and businesses who received payments from Eng. Specifically, the evidence of Eng's tax evasion included the following:

1. Bank statements and records of defendant's personal bank accounts;

2. Documents relating to defendant's purchase of and mortgage on 134 Gauldy Avenue;

3. Documents relating to a condominium owned by defendant at 141 Division Street;

4. Documents relating to the purchase of a building at 26 Bowery;

5. Records relating to the National Westminster Bank account of Chinese Moon Restaurant, a business owned by defendant;

6. Records relating to cashier's checks deposited into, and wire transfers made to, the National Westminster Bank accounts of two of defendant's businesses, World Express and Chinese Moon;

7. Money orders used by Eng to pay the following expenses:

a. automobile leasing and purchase payments and motor vehicle violations;

b. life insurance payments;

c. taxes;

d. telephone bills;

e. tuition payments;

8. Documents relating to defendant's purchase of certain Florida property, specifically a boat and a condominium.

In the remainder of this opinion, this court examines the particular evidence within each of these categories, which led it to determine that the government "ultimately" or "inevitably" would have discovered the challenged evidence absent the illegal search of the French Ice Cream Parlor safe.

B. *Active and Ongoing Tax Investigation*

[5] As an initial matter, this court found that the agents' illegal search of the French Ice Cream Parlor safe did not "trigger" or "catalyze" the tax evasion investigation of Eng. *See Falley*, 489 F.2d at 41. The original indictment, handed up on October 4, 1989, alleged that between September of 1982 and February of 1988 Shu Yan Eng engaged in a continuing criminal enterprise, as the principal administrator, and that as a result of a continuing series of narcotics violations, Eng derived substantial income and resources in violation of Section 848 of Title 21 of the United States Code. That indictment also accused Eng of conducting financial transactions involving the proceeds of this narcotics trade. There is no question that the narcotics and money laundering investigations were active at the time of the search.

Several pieces of evidence confirmed that the tax investigation of Eng was likewise active and ongoing at that time. First, as the Second Circuit recognized, it is "customary following commencement of narcotics and money laundering investigations [that] the IRS [begin] a tax evasion investigation" of the particular defendant. *Eng*, 971 F.2d at 856. Here, given that defendant was charged with importing and distributing more than 800 pounds of heroin and deriving substantial income from those activities, the government had substantial interest in and motivation to investigate his financial activities and to seek to forfeit the proceeds from the distribution of that heroin. That on October 18, 1989, the government had filed a complaint *in rem* which sought to seize and forfeit 26 Bowery as property acquired by drug transactions, corroborated this observation.

That the indictment was thereafter superseded to include tax acccounts did not negate the ongoing nature of the

investigation in October of 1989. The government frequently investigates narcotics defendant's possession and expenditure of large sums of money in order to establish participation in narcotics trafficking. For example, in *United States v. Briscoe*, 896 F.2d 1476, 1499-1500 (7th Cir.), *cert. denied*, 498 U.S. 863, 111 S.Ct. 173, 112 L.E.d.2d 137 (1990), the Seventh Circuit responded as follows to the defendant's contention that his failure to file tax returns was irrelevant to his narcotics prosecution:

> It is well settled that in narcotics prosecutions, a defendant's possession and expenditure of large sums of money, as well as his or her failure to file tax returns, are relevant to establish that the defendant lacked a legitimate source of income and that, in all probability, the reason for the failure to report this income is due to the defendant's participation in illegal activities.

See also United States v. St. Prix, 672 F.2d 1077, 1084 (2d Cir.) ("In a narcotics prosecution, it is well established that the government may introduce evidence of cash purchases coupled with tax evidence tending to show that a defendant had no legitimate source of cash.") *cert. denied*, 456 U.S. 992, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982); *United States v. Hinton*, 543 F.2d 1002, 1012-13 (2d Cir.1976) (finding relevant to narcotics prosecution evidence of defendants' failure to file tax returns "admitted as a corollary to the Government's presentation of evidence regarding large expenditures made by [defendants] during several of the years in question . . . to negate the existence of any legitimate source for the money . . . expended"), *cert. denied*, 429 U.S. 1051, 97 S.Ct. 764, 50 L.Ed.2d 767 (1977).

Second, Agent Interdonato's testimony and documents admitted at the suppression hearing provided further evidence of the progress of the tax evasion investigation of Shu Yan Eng in October 1989. The agent testified that he commenced this investigation in the Summer of 1989, when he discovered, through an examination of public records, that Eng had purchased a building at 26 Bowery on behalf of a corporation over which he presided. *Tr.* at 78-79. This testimony was corroborated by his notes concerning the title search and the title search documentation. GX 385, 388. Agent Interdonato thereafter took further investigatory steps, including requesting Eng's individual and corporate tax returns, GX 358-73, preparing various subpoenas, GX 381-84, engaging in public records searches. *Tr.* at 170. Furthermore, prior to the search, other agents on the DEA Southeast Asian Task Force were reporting information about Eng's assets to Interdonato. *See Tr.* at 134-35 (information concerning condominium at 141 Division Street); *Tr.* at 114, 171 (information concerning Eng's use of money orders). In sum, the evidence supports this court's original conclusion that the tax evasion investigation was neither spurred nor catalyzed by the illegal search. *See Cole,* 463 F.2d at 173 ("Conduct is not a legal cause of an event if the event would have occurred without it.").

Defendant contended that the government would not have conducted a large-scale investigation into Eng's financial transactions absent the illegal search and that the search therefore tainted the entire investigation. As the Second Circuit noted, this assertion derived from the fact that the government subpoenaed only one bank prior to the search of the safe and that some weeks passed between the search and the issuance of some of the later subpoenas. This court had three responses to defendant's assertion. First, Agent Interdonato testified that he stepped up investigation of Eng's tax

evasion after the arrest because there was no longer a danger of alerting Eng to the existence of the tax investigation at that juncture. However, this court agreed with the Second Circuit that the government did not adequately explain why a subpoena to Bowery Bank did not risk this disclosure, nor why it believed that the banks would not abide by secrecy requests. Accordingly, this first response was least persuasive.

Second and more persuasive was the fact that an examination of Interdonato's investigative activity both prior to and following the search revealed a continuing issuance of subpoenas to ferret out Eng's activities. Those subpoenas were coupled with other investigative techniques during the same time period—for example, examinations of public real estate and tax records, canvassing of banks and other creditors, and inquiries into Eng's various businesses and properties—in order to acquire new information and corroborate information already possessed. These procedures are fully consistent with the cases, discussed above, which describe the type of investigations that typically occur in tax evasion cases using the expenditures method.

[6] Third and related, in order to establish the type of behavior that constitutes tax evasion, the government must engage in a lengthy and detailed analysis of the taxpayer's resources and expenditures; thus, although the tax evasion investigation of Eng was still in its formative stages when the illegal search of the safe occurred, the government's motivation to pursue that investigation was compelling, and the agents' behavior in the Summer and Fall of 1989 was consistent with their active pursuit of this investigation. Particularly noteworthy was the short time span between Interdonato's initiation of the tax investigation and the unlawful search of the safe; the agent's investigative activity

during that period sharply contrasted with what occurred in a case like *Roberts*, where subpoenas lay dormant for months prior to the unlawful search.

For the foregoing reasons, this court concluded that at the time of the search of the French Ice Cream Parlor safe, the government's investigation was in a sufficiently advanced stage to compel the finding that "alternate means of obtaining the evidence" were "in existence and, at least to some degree, imminent, if yet unrealized" and that "the evidence produced by the investigation was simply the normal output of that investigation." *Eng*, 971 F.2d at 861.[5] Consequently, this court turns to the second prong of the inevitable discovery analysis mandated by the circuit court, 971 F.2d at 862, namely an examination of each item of evidence proffered at the suppression hearing and at trial to determine whether the government inevitably would have discovered that evidence by lawful means absent the illegal search.

[5]At 971 F.2d at 858, the circuit court would appear to be chastising this court in writing:

> The district judge initially indicated that he would provide a rather lengthy opinion to support his conclusions. However, the judge later decided not to issue the promised opinion because, in his view, the "inevitable discovery doctrine [gave] rise to a conclusion which I thought was compelled" under the circumstances. He did not elaborate further on any aspect of the evidence challenged by Eng, or explain what "compelled" his conclusion that each item of evidence inevitably would have been discovered lawfully absent the search.

The decision not to issue the "promised opinion" was compelled by an unrelenting criminal docket which included, at that time, *United States v. John Gotti, et al*, in which six "rather lengthy opinions" were written during the early months of 1991.

C. *Particularized Findings on Challenged Evidence*

1. *Eng's Personal Bank Accounts*

[7] Interdonato commenced his tax evasion investigation long before the unlawful search by requesting Eng's and his wife's personal tax returns in January of 1989 and again in August of 1989. *Tr.* 81-85. The returns, prepared by accountant Wang F. Luk, *Tr.* at 53, showed that Eng maintained personal bank accounts in New York at Bowery Savings Bank, Manhattan Savings Bank, Hang Seng Bank, and National Westminster Bank. *Tr.* at 33, 85-86. However, the tax returns did not provide account numbers for these various accounts. *Tr.* at 86. The mortgage application to Long Island Savings Bank for Eng's residence at 134 Gauldy Street, also obtained by Interdonato prior to the search, confirmed the existence of Eng's account at Manhattan Savings Bank and indicated that he had an account at Citibank. *Tr.* at 173. Based on the reasoning provided below, this court found that all the information obtained from these personal bank accounts was encompassed by the inevitable discovery doctrine of *Nix v. Williams*.

As an initial matter, government exhibits 136-55, obtained via a subpoena served on the Manhattan Savings Bank, GX 380, clearly should not have been suppressed. Interdonato prepared that subpoena in August of 1989, before the search, and served it soon thereafter—in the autumn of 1989. *Tr.* at 33-35. Documents received from the other banks were slightly more difficult to analyze since there were no pre-search subpoenas issued as to those banks. Nevertheless, this court found three reasons for concluding that Interdonato ultimately would have prepared and served subpoenas for all the bank accounts listed above, even if the illegal search had never taken place.

The first reason was case law indicating the routine course taken in other expenditures investigations. The tax cases discussed earlier in this opinion clearly indicate that in a prosecution for tax evasion which uses the expenditures method of proof, the government must present information of the accused's "assets, sources of money, and cash inflows and outflows" in order to satisfy its *prima facie* burden. *See Mastropieri,* 685 F.2d at 779 (examination of 32 bank accounts used by defendants); *Bianco,* 534 F.2d at 504-06 (letters to approximately 100 banks); *see also Caswell,* 825 F.2d at 1233 (extensive investigation of bank records); *Terrell,* 754 F.2d at 1144-48 (contacting nearly 30 banks). Obtaining bank accounts, these cases demonstrate, is an "invariable" and "routine" means of acquiring this essential information.

The second reason was the copy of Agent Interdonato's pre-search notes, dated August 16, 1989, memorializing a meeting among the agent and several Assistant United States Attorneys working on the civil and criminal investigations of Eng. GX 385. That document justified the finding that Agent Interdonato would have subpoenaed the bank records in that it lists the investigative steps that the DEA Southeast Asian Task Force had yet to take in its pursuit of Eng. Item 3 of that list states "obtain grand jury subpoenas re Banks." GX 385. Clearly, prior to the search, Interdonato possessed an intent to contact the banks where Eng held accounts.

The third reason was Interdonato's testimony which corroborated both his intent to issue the subpoenas in question and also confirmed the applicability of the general proposition extracted from the tax evasion cases—that contacting all available banks is a routine part of an expenditures investigation—to Interdonato's tax investigation in particular:

Q: When you are doing an investigation using the expenditure method of proof are bank accounts of interest?

A: Yes. It shows us how the taxpayers were spending his money, if he is utilizing his checking account and given credit for decreases in his account or charged with an increase in his account in the computations.

Q: You would review those records for an analysis of the expenditures as well as nontaxable sources of funds?

A: Yes.

Q: Once you identified bank accounts, what did you do?

A: I would subpoena the banks for all bank records regarding Shu Yan Ng.

Tr. at 31-32. His testimony on redirect was similarly corroborative:

Q: Were these accounts subpoenaed after [Eng] was arrested?

A: Yes.

Q: Would you have subpoenaed those accounts in any event based on the information on the tax return and loan application?

A: Yes.

Q: When you subpoenaed both Manhattan Savings Bank and Citibank, what information would you have obtained? . . . What was your normal—

A: Everything, signature cards, statements, deposit slips, deposit items, checks drawn on the account.

> Q: In an expenditures case, would you invariably obtain all cancelled checks?
> A: Yes.

Tr. at 173-74. Although the Second Circuit cautioned against reliance on Interdonato's testimony alone, that testimony is "deserving of careful consideration as part of the analysis," 971 F.2d at 862, especially when it is corroborated by both facts and law. Interdonato's investigation *was* sufficiently corroborated by both facts and law as to these accounts to drive this court to conclude that the inevitable discovery doctrine applied.

Finding that Interdonato ultimately would have investigated Eng's bank accounts even if the illegal search never occurred did not complete the inevitable discovery inquiry with respect to information obtained from those accounts, however. As the Second Circuit noted:

> An important question is to what extent possession of an account number makes more likely a satisfactory response to a bank subpoena, a point on which Interdonato's testimony appears to be contradictory.

Eng, 971 F.2d at 862. The Second Circuit premised this observation on the fact that Interdonato had subpoenaed account records from the Bowery Bank prior to the search, and the bank responded erroneously by stating that it had nothing on file for Eng, his wife, or his ex-wife. *Tr.* at 86, 144. Since providing only account holders' names and social security numbers—and not their account numbers—to the Bowery Bank was unsuccessful and since Interdonato used account numbers found in the illegal search of the French Ice Cream Parlor safe when he served subpoenas on Citibank, Hang Seng Bank, and National Westminster Bank,

Tr. at 32, 88-91, 173; GX 83-86, defendant argued that account numbers are necessary to subpoena bank accounts.

Both testimony and exhibits presented to this court belied defendant's assertion, and the circuit court's assessment, that Interdonato's testimony was contradictory. First, there was evidence that Eng had closed his account at the Bowery Bank prior to the date of the subpoena. *Tr.* at 144, 180. Accordingly, the erroneous response to this subpoena was of only limited probative value with respect to open accounts. More persuasively, government's exhibit 380, the subpoena for records of Eng's account at Manhattan Savings Bank dated August 16, 1989, contained no reference to an account number: no number appears on the face of the subpoena for the bank account nor in any of the documents appended to the subpoena. Furthermore, Interdonato testified about this subpoena as follows:

> Q: Did there come a time when you subpoenaed the Manhattan Savings Bank?
> A: Yes.
> Q: When did you subpoena the Manhattan Savings Bank?
> A: Probably October of '89, around that time.
> Q: Do you have any specific recollection when you subpoenaed the Manhattan Savings Bank.
> A: October, November, '89, something like that.
> Q: Did you have account numbers when you subpoenaed Manhattan Savings Bank?
> A: I don't recall specifically.
> Q: Do you have a copy of the subpoena from Manhattan Savings Bank, Shu Yan Ng's bank account?
> A: Yes.

* * *

Q: Do you recall when you got a response to that subpoena?
A: Soon after the serving of the subpoena.
Q: What did you get in response?
A: Records regarding some of Shu Yan Ng's accounts at Manhattan Savings Bank.
Q: Which account?
A: I believe two checking accounts and passbook savings account.
Q: Records—can you be more specific?
A: Checking account, monthly statement, deposit items, copies of checks drawn on the account. The saving account, copy of the passbook.

Tr. at 86-88; *see also Tr.* at 101, 160-61, 173. Clearly, then, despite the ambiguity surrounding the date on which Interdonato served his subpoena, the absence of account numbers—demonstrated not by testimony but by the document itself—did not affect the bank's response.

In sum, notwithstanding the Bowery Bank's error, the evidence—the Manhattan Savings Bank's response to its subpoena corroborated by Interdonato's testimony and coupled with the unique situation affecting the Bowery account—supported the conclusion that banks will respond to subpoenas based solely on a name or on a name in conjunction with a social security number or employee identification number. *Tr.* at 170. Interdonato knew of the existence of all of the accounts from Eng's pre-search tax returns and mortgage application; he also knew Eng's social security number. Interdonato was armed with sufficient information to subpoena Hang Seng Bank, National Westminster Bank and Citibank, and therefore a subpoena to those banks for information about their accounts inevitably would have resulted in the desired documentation. It is worth mentioning

that defendant did not claim—nor was there evidence to support a claim—that these subpoenas were somehow unduly burdensome, violative of the defendant's right against self-incrimination, or in search of privileged documents. *See Roberts*, 852 F.2d at 676. Rather, the government established a "substantial and convincing basis for believing that the requisite information would have been obtained by subpoena." *Eng*, 971 F.2d at 860.

Bearing in mind the inquiry required by this circuit in determining whether evidence would have been inevitably discovered, this court found that "there was an ongoing [investigation] which surely would have uncovered the [documents] at issue." *Pimentel*, 810 F.2d at 369. Furthermore, excluding government exhibits numbered 83-86 and 136-55 would not have served the deterrent purpose of the exclusionary rule. *See id.*

2. *American Express Bills and Records*

[8] Eng was in possession of American Express cards at the time of his arrest. GX 357. Agent Interdonato subpoenaed and received from American Express all records regarding accounts held by Eng. *Tr.* at 73; GX 4-31. Defendant did not challenge these records.

3. *134 Gauldy Avenue*

Eng's 1988 tax returns as well as documents seized from his person at the time of his arrest showed that Eng resided at 134 Gauldy Avenue in Staten Island New York. GX 357, 362. Prior to Eng's arrest, Interdonato performed a title search on this property which indicated that Eng had a mortgage held by Long Island Savings Bank. *Tr.* at 21-22, 123. A pre-search grand jury subpoena was issued to that

bank on September 19, 1989, and it responded later that month by producing Eng's mortgage application and statements evidencing payment history. *Tr.* at 23; GX 132-35. In addition, from the mortgagee's records, Interdonato learned that the Atlantic Mutual Corporation was the mortgage broker for 134 Gauldy; a subpoena to Atlantic Mutual provided Agent Interdonato with Eng's residential loan application and good faith estimate letter. *Tr.* at 27; GX 32, 33. Defendant did not challenge these exhibits.

After a post-search examination of account records from Eng's various personal bank accounts described above, Interdonato determined that Eng had not been using his checking accounts to make mortgage payments. *Tr.* at 24. The unlawful search of the safe confirmed this observation by disclosing numerous money orders payable to Long Island Savings Bank and drawn on a variety of different bank accounts. *Tr.* at 24-26, 123-24; GX 3, 49, 61, 62, 64, 72, 122, 200, 203, 210, 212, 213, 337, 340.

In November of 1989, Interdonato subpoenaed Woodmont Development Corporation, the seller of the 134 Gauldy property, and Albert Temkin, the seller's attorney. *Tr.* at 29, 124. The names of each were revealed by the aforementioned pre-arrest title search. *Tr.* at 21; GX 348. In response to this subpoena, Interdonato, received a closing statement, customer ledger, and various money orders and checks paid to Woodmont Development Corp. *Tr.* at 28-29, 124-25; GX 348-55. Defendant argued that since the government failed to investigate Eng's method of payment for the house until November—a month after the search of the safe—the documents obtained as a result of subpoenas to Long Island Savings Bank, Woodmont, and Temkin should have been suppressed as products of the illegal search. In response, the government contended that Interdonato ulti-

mately would have discovered the documents relating to 134 Gauldy, even without the illegal search, because:

> Eng's bank account records showed that Eng was not paying the mortgage from his checking accounts; Interdonato had confidential information prior to the unlawful search that Eng was using money orders to pay many expenses and therefore discovery of the money orders was inevitable because the government's next step in light of this information would have been to obtain the Long Island Savings Bank's deposit items, presumably by subpoena, which would have turned up the money orders.

Eng, 971 F.2d at 862. In obedience to the circuit court's remand, this court addresses the following three questions: whether lawful discovery of the bank account records themselves was inevitable; whether Interdonato had pre-search information that Eng was using money orders; and whether, in order to discover this type of money order, one must know where and on what date the money orders were deposited after receipt by the payee. *Id.*

[9] As an initial matter, this court already has found that discovery of the accounts was inevitable. Moving to the second question, which similarly applies to much of the challenged evidence discussed below, it was clear that at some point during his investigation Agent Interdonato received information from a confidential source that Eng was using money orders to pay for various expenses. What seemed, at first glance, to be in dispute was whether the agent obtained this information prior to or following the search of the safe:

Q: You told us this morning on direct examination that a confidential source said that Mr. Ng used money orders to pay for the cars, is that correct?
A: Paid for expenses.

* * *

Q: When you obtained the information from the confidential source that Mr. Ng used money orders to pay for expenses, did you personally conduct that interview or was that secondhand from a Drug Enforcement Administration agent?
A: *I would say both, I was party to some debriefings and others I wasn't.*
Q: Now, when you learned—Your Honor, I am going to try to ask the question so the agent doesn't divulge the name of the source.
When you were at the debriefing, were there more than one debriefing where payment by money orders was discussed?
A: (No response)
Q: Withdrawn.

When did the confidential sources tell you Mr. Ng used money orders to pay for his expenses?
A: Debriefing *I was party to* would have been the summer of 1990.
Q: Did you have information prior to Mr. Ng's arrest and prior to the search of the safe from confidential sources that Mr. Ng used money orders to pay for his expenses?
A: I don't believe so.

Tr. at 114 (emphasis added). And then:

> Q. What information did you have before the search of the safe about his purchasing money orders?
> A: From confidential sources I was told Shu Yan Ng had people purchasing money orders for him.
> Q: That is pre-arrest information?
> A: Yes.

Tr. at 171. Close examination and analysis of the foregoing testimony, elicited on cross and redirect respectively, reconciled the seemingly contradictory statements. On cross, Agent Interdonato indicated that he had two sources of information about money orders: his personal interviews with confidential informants; and other agents' interviews. Clearly, he, himself, did not have the opportunity to debrief the source of the information until 1990, well after the search. However, his testimony on redirect established that prior to the search he had information from other agents that Eng was using money orders.

The third consideration is the information that is necessary to recapture money orders. The Second Circuit incorrectly believed that Interdonato's testimony indicated that "in order to discover money orders such as those used by Eng to pay Long Island Savings Bank, one must know where and on what date the money orders were deposited after receipt by the payee." *Eng*, 971 F.2d at 863. On cross examination, Agent Interdonato testified as follows:

> Q: A money order isn't like a check, you have to have a bank number, a bank, number of the money order and you don't have to have a date essentially, don't you?
> A: To obtain it from the bank to issue it, yes.

Q: Otherwise you have to go to the bank into which it was deposited?
A: Yes.

Tr. at 102. Thus, the procedure for obtaining information from the bank of deposit, rather than from the issuing bank, does not require the same information. Other testimony corroborated this observation:

Q: You testified it is the practice of banks to microfilm deposit items. In your experience at the Internal Revenue Service do all banks microfilm deposit items?
A: Yes.
Q: In your experience, have you ever requested a deposit item and not received it?
A: No.
Q: You have been in the Internal Revenue Service for how long?
A: Six years.

* * *

Q: In other words, you [request all deposit slips] armed with the date of a payment, approximate date of a payment and account number, is that correct?
A: Yes.

Tr. at 180; *see also Tr.* at 189 and DX A (indicating that microfilming errors do occur).

In sum, Eng's bank records showed that he was not paying his mortgage by check. Given that the tax expenditures method of proof requires a showing of assets and payments that Interdonato had confidential information that Eng had

been using money orders to pay his expenses, this court found that, even absent the illegal search, the government inevitably would have discovered GX 349-55, documents relating to the closing at 134 Gauldy, that were in the possession of Woodmont and Temkin.[6]

4. *141 Division Street*

[10] Interdonato had confidential information prior to the search that Eng owned a condominium at 141 Division Street in New York City. *Tr.* at 27-28, 132-35. Bank records and the condominium unit number found several days later in the safe confirmed that Eng owned the condominium at 141 Division Street; the safe documents also indicated the identities of the seller (Chu Mui Associates), the seller's attorney (Hass, Greenstein), and Eng's attorney (Po Yuen). *Tr.* at 136-37. Interdonato thereafter commissioned a title search for 141 Division Street, Unit 3, *Tr.* at 132, which revealed this identical information. *Tr.* at 29-31. A subpoena subsequently served on these parties, in November of 1989, produced documents showing that Eng had purchased the condo in December 1988 for $200,000. *Tr.* at 29-31, 136-38; GX 78-82, 356.

[6]As to documents—specifically money orders—obtained directly from the safe or from subpoenas served after the suppression hearing seeking to mirror evidence from the safe, defendant's original motion challenged admission of this evidence. Despite representations to the contrary (Government's Brief at 6 & n. 2), the government did not seek to admit any of the money orders for the 134 Gauldy residence into evidence at trial. This court addresses the admissibility of these documents only insofar as they are affected by the issue of money orders generally and declines to make specific findings as to the documents' admissibility for reasons described later in subsection 7 of this discussion.

The Second Circuit emphasized the fact that Interdonato never wrote down the confidential information he received regarding this property. A careful examination of the agent's testimony concerning the point in his investigation when he learned of the apartment's existence is revealing on this matter, however:

> Q: You didn't know that 141 Division Avenue existed until you got the safe documents, is that correct?
> A: That is not true. There was information from confidential sources that Mr. Ng purchased some property on Division Street.
> Q: When was that information obtained?
> A: Immediately—I would say within a couple days before his arrest.

THE COURT: That information tell you where on Division Street?
THE WITNESS: Yes, 141 Division Street.

> Q: An informant told you that Mr. Ng purchased property at Division Street?
> A: I got it from other agents.
> Q: You were not present at a debriefing when this information was disclosed, is that correct?
> A: That's correct.
> Q: Do you have notes of your conversation with other agents concerning the disclosure of that information?
> A: I don't believe so, I remember him telling me. And noting it.

Q: Somebody told you that Mr. Ng owns a piece of property at 141 Division Street and you didn't make any notes about that?
A: No. This happened, I would say within a day or two of the arrest.
Q: Did you know when Mr. Ng was going to be arrested?
A: Yes.

* * *

Q: Do you recall who the agent was that you spoke to concerning the 141 Division Street?
A: Yes.
Q: Who was that agent?
A: Special Agent Barry Tang.
Q: Can you tell us what Agent Tang told you concerning Mr. Ng's alleged ownership of 141 Division Street?
A: I remember him saying: Tom, we have information that Shu Yan Ng also owns a condominium at 141 Division Street.

* * *

Q: Did he tell you when he learned this information?
A: I believe it was—that was new, recent information, otherwise I would have known it earlier.
Q: Were you in constant communication with Agent Tang concerning Mr. Ng's investigation?
A: Yes.

Tr. at 13-35. This testimony indicated that the government learned of Eng's ownership of the 141 Division Street con-

dominium immediately before the arrest. Although Interdonato did not write the address down, this court found his testimony as to his knowledge of this address credible and fully consistent with his specific recollection of details surrounding his acquisition of this information.

Accordingly, this court concluded that the government inevitably would have discovered the information concerning 141 Division Street even without the search of the French Ice Cream Parlor safe. First, Interdonato ultimately would have investigated this information about the property since the very purpose for his tax evasion investigation was to determine where Eng's money was going. Second, despite defendant's claim that a unit number is necessary in order to conduct a title search, a search using only the condominium address and the owner's name would have revealed that Shu Yan Eng owned Unit Number 3.[7] In sum, then, this court found government exhibits 78-82 obtained from the attorney of the seller of 141 Division Street to fall within the inevitable discovery rule.

5. *26 Bowery and Bowery Mansion Inc.*

[11] Prior to Eng's arrest, the government possessed confidential information that Eng had an interest in a building located at 26 Bowery and that he presided over a business, Chinese Moon Palace, at that location. *Tr.* at 50, 91-92. In the Summer of 1989, prior to the search of the safe, Interdonato performed a title search on the 26 Bowery building which revealed that it had been sold in December of 1986 by a corporation called 26 Bowery Crop. to a corporation

[7]Even assuming that a unit number is a prerequisite, the fact that there were only nine units at that address means that a search of all units to determine their owners is likely if interviews that the agent intended to conduct did not reveal Eng's unit number.

called Bowery Mansion Inc. *Tr.* at 50, 125-132. The title search also revealed the name of the selling corporation's attorney—Ronald De Petris, Esq., *Tr.* at 130—and that Eng was president of Bowery Mansion, the purchasing corporation. *Tr.* at 50, 127, 131.

Interdonato thereafter, but still in the Summer of 1989, requested the Bowery Mansion certificate of incorporation from the State of New York, *Tr.* at 79, and the tax returns for Bowery Mansion and Chinese Moon from the IRS. *Tr.* at 81-82; GX 367-69, 376. At some later date, Interdonato also obtained the Chinese Moon tax returns from Wang F. Luk, defendant's accountant. *Tr.* at 58. Finally, a request to the United Service Abstract Corp. provided Interdonato with the deed for 26 Bowery, GX 341; this deed revealed that Eng's attorneys involved in the purchase of 26 Bowery were Frank Lam and Hwa Min Hsu. *Tr.* at 71, 131, 150. Interdonato acquired all of the above information relating to 26 Bowery prior to the search of the French Ice Cream Parlor safe.

In November of 1989, Interdonato, subpoenaed and recovered from De Petris, attorney for 26 Bowery Corp., a closing statement and report on the building, GX 105, and a check drawn on World Express International Holding Corp. to Hwa Min Hsu. *Tr.* at 51; GX 124. A subpoena to Sol Leitner and Frieda Grant—the owners of 26 Bowery—in November of 1989 produced deposit slips, deeds, checks, and the mortgage note. *Tr.* at 52, 145-46; GX 105, 124, 127, 330-35. Also in November of 1989, Interdonato subpoenaed Frank Lam. *Tr.* at 71, 131, 149-50. From Lam, the government obtained the following: money orders from various banks payable to Lam, GX 1, 55, 77, 336; Lam's escrow ledger relating to Bowery Mansion, GX 130; checks reflecting payments on the sale of 26 Bowery, GX 129; and

certified checks received by the seller of 26 Bowery at the closing, GX 327-28. *Tr.* at 71-73, 155-56, 157.

The title search, tax returns, and documents provided by the seller and its attorney reflected that 26 Bowery was purchased in December 1986 for 1.7 million dollars, half of which was paid at closing and half of which was subject to a mortgage held by the seller. Clearly, even more than with the other properties discussed above, the 26 Bowery building was an important source of information going to Eng's tax responsibilities.

While acknowledging the substantial information possessed by Interdonato as to 26 Bowery prior to the illegal search, the Second Circuit emphasized the fact that Interdonato did not know the names of sellers Leitner and Grant until after that search, *Tr.* at 130:

> The important evidence admitted at trial concerned closing information on the price paid and the amount borrowed by Eng to purchase the 26 Bowery building. At least some of the closing information admitted at trial may have been provided only by Leitner and Grant. To the extent that Leitner and Grant were the source of the closing information, inevitable discovery of the evidence in their possession becomes more difficult to prove because their identities were discovered in the search of the safe.

Eng, 971 F.2d at 863. In this respect, the circuit court appears to have overlooked evidence from sources other than Interdonato which clearly reveals that misconception. For example, one the same day as Eng's arrest, October 18, 1989, the government sought forfeiture of the 26 Bowery building by filing a complaint *in rem* against the defendant property. (Exh. 2 to Government's Reply Brief) The circuit

court was aware of this fact and alluded to it specifically at 971 F.2d at 857. Paragraphs four and five of that complaint state:

> 4. The defendant is owned by Bowery Mansion, Inc. which is a domestic corporation that is wholly owned by Shu Yan Ng. Mr. Ng is the president of the corporation and also the sole shareholder.
>
> 5. Bowery Mansion, Inc. took title to the defendant on December 16, 1986 for the sum of approximately $1,700,000.00. Shu Yan Ng. paid $850,000.00 at the closing and the seller, 26 Bowery Corp., took back a mortgage of $850,000.00. That mortgage was then assigned to *Sol Leitner,* 1311 Brightwater Avenue, Brooklyn, New York and *Frieda Grant,* 112 Mackenzie Street, Brooklyn, New York, each having an undivided one-half interest.

This complaint confirmed not only that the government was aware of the identities and addresses of Leitner and Grant, but also that the government knew Leitner and Grant had taken back a mortgage from Eng.

In sum, as Interdonato possessed substantial information about the 26 Bowery sale prior to the unlawful search—including the identities of all parties involved—this court found that the government inevitably would have discovered government exhibits 1, 55, 77, 105, 124, 127, 129-30, 327-28, and 330-36. Accordingly, defendant's motion to suppress documents related to Eng's purchase of 26 Bowery was properly denied.

6. *Chinese Moon Palace, French Ice Cream, and World Express*

[12] Intertwined with the purchase of the 26 Bowery building was information relating to Eng's various businesses in or near that location. For example, as mentioned above, confidential sources advised DEA agents that Eng was the president of Chinese Moon Palace, Inc. d/b/a Bowery Restaurant. *Tr.* at 91-92. Either an examination of the corporate tax returns for Chinese Moon, obtained from accountant Luk, *Tr.* at 58, or a Treasury Enforcement Communication System ("TECS") check for deposits over $10,000, GX 374-75; *Tr.* at 36, 94-95, revealed that this business maintained a bank account at National Westminster Bank.

In August of 1989, again prior to the search, Interdonato subpoenaed the National Westminster account records for Chinese Moon, GX 382, and thereafter obtained the following: monthly statements, GX 163, 165, 167; deposit items, GX 164, 168, 170; deposit slips, GX 169; corporate resolutions, GX 162, debit advice reflecting transfers to the Chinese Moon Palace Account, GX 165-66; and a signature card, GX 161. *Tr.* at 36-37, 58-59, 93-94. Some of these materials were forwarded to him immediately, and some took several months to arrive. *Tr.* at 94. Analysis of these records indicated that cashier's checks, totaling $140,000 and issued by Hang Seng Bank, had been deposited in Chinese Moon's account in June and September of 1987. *Tr.* at 58-59, 148. Specifically, those items included GX 109 ($50,000 cashier's check dated June 23, 1987 and issued by the Hang Seng Bank); GX 113 ($30,000 cashier's check dated September 3, 1987 and issued by the Hang Seng Bank); GX 119 ($50,000 cashier's check dated September 3, 1987 and issued by the Hang Seng Bank); GX 117 ($50,000

cashier's check dated September 7, 1987 and issued by the Hang Seng Bank).

Shortly after Eng's arrest, Interdonato issued a subpoena to Hang Seng bank for records pertaining to these cashier's checks issued by that bank and deposited into Chinese Moon's National Westminster Bank account. In response to that subpoena, he received a series of applications for and copies of the checks. *Tr.* at 58-62; GX 106-08, 112-13, 116-19, 123. Defendant does not challenge exhibits 106-13 or 116-19.

Around the same time, in November of 1989, Interdonato subpoenaed National Westminster for records pertaining to the French Ice Cream Parlor, *Tr.* at 58, 68; GX 175-78,[8] and to World Express International. *Tr.* at 62. Interdonato learned of the existence of World Express through documents received from Leitner and Grant and from Luk. *Tr.* 146-49. However, Interdonato also learned of World Express from the National Westminster Bank checkbook discovered in Eng's safe. *Tr.* at 146-47. As a result of the National Westminster subpoena and subsequent follow-up subpoenas, Interdonato obtained a series of cashier's checks and wire transfers to Hong Kong Banks. *Tr.* at 62-67, 153-55; GX 37-38, 114-15, 125-26, 179-99, 342-47.[9] He also received information about World Express from Hsu in

---

[8]This evidence included an account signature card (GX 175); corporate resolutions (GX 176); monthly statements (GX 177); and deposit tickets and items (GX 178).

[9]The specific records included: checks drawn on the World Express account (GX 128, 184-85, 191-92, 199); deposit items (GX 183, 187-90, 193, 195-98, 344); a signature card (GX 179); corporate resolutions (GX 180); monthly statements (GX 181, 186); deposit tickets (GX 182); copies of certified checks (GX 194).

(Footnote continued on next page.)

November, although he knew of Hsu's existence prior to the search. *Tr.* at 151.

As the Second Circuit recognized, Interdonato had detailed knowledge of cashier's checks and fund transfers that related to Chinese Moon and the French Ice Cream Parlor and, more importantly, this knowledge was rooted in pre-search events. *Eng*, 971 F.2d at 863. Since the only step that remained to discovery of the numerous cashier's checks issued by Hang Seng Bank was the "routine" and "invari-

---

(Footnote continued.)

National Westminster also supplied the following deposit items: a $100,000 cashier's check issued by Wing Lung Bank Limited on August 20, 1986 (GX 343); a $200,000 cashier's issued by Wing Lung Bank Ltd. on August 20, 1986 (GX 347); a $50,000 cashier's check issued by Kwangtung Provincial Bank on August 22, 1986 (GX 126); a $300,000 wire transfer issued by Bank of Credit and Commerce in October 1986 (GX 37); a $300,000 wire transfer issued by Bank of Credit and Commerce in November 1986 (GX 38); and a $50,000 cashier's check issued by Hang Seng Bank on September 3, 1987 (GX 115).

Finally, subpoenas to the various issuing banks—including the Wing Lung Bank Limited, the Kwangtung Provincial Bank, the Hang Seng Bank and the Bank of Credit and Commerce—resulted in the following evidence: copies of the applications for the August 20, 1986 $100,000 and $200,000 Wing Lung Bank cashier's checks (GX 342, 345); copies of demand drafts indicating that the August 20, 1986 $100,000 and $200,000 Wing Lung cashier's checks were purchased for cash (GX 343, 346); copies of the August 20, 1986 $100,000 and $200,000 Wing Lung Bank cashier's checks reflecting that those checks were paid (GX 344, 347); a copy of the application for August 22, 1986 $50,000 Kwangtung Provincial Bank cashier's check (GX 125); a copy of the August 22, 1986 $50,000 Kwangtung Provincial Bank cashier's check (GX 126); a copy of the application for the September 3, 1987 $50,000 Hang Seng Bank cashier's check (GX 114); a copy of the September 3, 1987 $50,000 Hang Seng Bank cashier's check (GX 115).

able" issuance of a subpoena for the types of records that Hang Seng could be expected to—and did in fact—produce, this court found that the inevitable discovery doctrine was properly applied to government exhibits 161-70, 106-09, 112-13, 116-19, 175-78.

Although Interdonato learned of the World Express account at National Westminster from a checkbook found in Eng's safe, he also learned of that business's account—just as he learned of the account for the French Ice Cream Parlor—from documents provided by Luk and others. While distinguishing between these sources of knowledge is impossible, that task is equally unnecessary because this court found that Interdonato inevitably would have discovered the existence of World Express and its bank account without the unlawful search. First, as more fully set forth above in relation to personal bank accounts and properties, business accounts are a routine source of information in tax expenditures cases. Second and more importantly, Interdonato possessed multiple sources for this information prior to the search, and each of these sources—defendant's accountant and the holder of an $850,000 mortgage on defendant's property—were inevitable targets of government subpoenas.

Since legitimate investigatory techniques would have revealed the existence of this business, any derivative evidence was not tainted merely because illegally seized documents also led to its discovery. Finding otherwise would offend the rationale of *Nix*, which requires this court to look beyond police misconduct and instead seek to balance " 'the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime . . . by putting the police in the same, not a *worse*, position that they would have been in

if no police error or misconduct had occurred.' " *Gorski*, 852 F.2d at 695 (*quoting Nix*, 467 U.S. at 443, 104 S.Ct. at 2508). As this court implicitly found that applying the exclusionary rule to government exhibits 37-38, 125-128, 179-99, and 342-47 would have served no deterrent purpose, it therefore reaffirms its denial of defendant's motion to suppress those exhibits.

7. *Equitable Life, NYNEX, New York Military Academy, Automobile Companies and City, State and Federal Agencies*

[13] The money orders used by Eng to pay the various entities included in this category presented common questions of law and fact. Accordingly, this court first will discuss how the government knew of Eng's obligations to each entity prior to the search of the safe and what specific information the government obtained from the safe. It then will discuss whether the inevitable discovery exception to the exclusionary rule applied to all or any of this evidence.

a. *Payments for Taxes:* Records of the Internal Revenue Service and the New York State Department of Revenue reflected the date and amount that Eng paid in taxes. *Tr.* at 68. The safe contained evidence that Eng paid his taxes by money order. GX 48, 53-54, 58-59, 74, 339 (money orders payable the IRS); GX 41, 87-89 (money orders payable to the New York State Department of Income Tax). The government offered into evidence at trial deposit items from the banks where state and federal tax payments were deposited.

b. *Payments for Violations:* The safe also contained money orders used by Eng to pay various parking and

building violations. *Tr.* at 117-18; GX 56, 57, 65, 66, 68, 206 (money orders payable to the Finance Commission of New York): GX 317, 320 (money orders payable to Parking Violations Bureau). Agent Interdonato testified that he never went to the Parking Violation Bureau to find out whether Eng had any outstanding violations, nor was he in the process of checking parking violations at the time of the search. *Tr.* at 116, 118. He also testified that he had never had to take this investigative step in any of his cases. *Tr.* at 117.

c. *Life Insurance:* At the time of his arrest, defendant had on his person an Equitable Life Insurance card. *Tr.* at 46-47, 142; GX 357. As a result of a post-search subpoena to Equitable Life, the government obtained various documents pertaining to Eng's insurance policy which indicated defendant's premium history. *Tr.* at 47-48, 142; GX 91-93. Defendant did not contest admissibility of these documents. Defendant did challenge money orders payable to Equitable Life that came from the safe, GX 44-45, 47, 60, 67, 90, 202, 204, 207-08, and any evidence derived from those orders.

d. *Tuition Payments:* Agent Interdonato subpoenaed the New York Military Academy after discovering in the safe a teller's check receipt payable to that institution. *Tr.* at 158-62. In addition, records from Eng's Manhattan Savings Bank accounts, the source of which was pre-search information, revealed that Eng made withdrawals in order to purchase cashier's checks payable to the Academy. *Tr.* at 74, 160-61, 180; GX 155. From the subpoena served upon the Academy, the government received account statements, receipts, and Eng's son's admissions application for the Academy. *Tr.* 74, 159-61; GX 215-17.

e. *NYNEX Payments:* The government retrieved a money order payable to NYNEX from the safe of the French Ice Cream Parlor. *Tr.* at 75; GX 315. However, the government was aware at the time of the arrest that Eng owned a portable telephone, *TR.* at 75, and seized that phone from him at the arrest. *Tr.* at 75. The government made no pre-search attempt to determine his method of payment for the phone. *Tr.* at 165-66.

f. *Automobile Payments:* Prior to Eng's arrest, Agent Interdonato conducted several searches with the Department of Motor Vehicles. *Tr.* at 4, 98; GX 386-87. From these searches, the agent learned that Eng owned a 1988 Mitsubishi and leased a 1989 Dodge Van and a 1989 Mercedes Benz.[10] *Tr.* at 5, 175. The Department of Motor Vehicles records revealed each car's Vehicle Identification Number ("VIN") which enabled Agent Interdonato to determine the insurance company for that vehicle and the names of the dealerships that sold or leased these cars to Shu Yan Eng. *Tr.* at 4-5, 174-75. Furthermore, when he was arrested, Eng possessed registration receipts for each of these cars. *Tr.* at 176-77; GX 357.

From pre-search information, Agent Interdonato discovered that Bay Ridge Mitsubishi sold the Mitsubishi to Eng and that State Farm Insurance Company insured this vehicle. *Tr.* at 12, 102. Documents seized in the illegal search, specifically money orders and a Manhattan Savings Bank teller's check stub payable to Bay Ridge Mitsubishi, confirmed this information. *Tr.* at 99-100; GX 2, 36, 42, 43,

[10]The government did not seek to admit evidence regarding the Mercedes at trial.

201, 209, 316.[11] It also was confirmed by a teller's check payable to Bay Ridge, GX 154, received from the Manhattan Savings Bank. Thereafter, Agent Interdonato obtained receipts of payments directly from Bay Ridge Mitsubishi which reflected the date and amount of payments made by Eng on the 1988 Mitsubishi as follows: on January 26, 1990, Eng made a payment of $1000; on January 29, 1990, Eng made a payment of $1000; also on January 29, 1990, Eng wrote four checks to Bay Ridge Mitsubishi in the amount of $500, $1000, $7,500 and $8000. *Tr.* at 6, 99; GX 39. Bay Ridge also supplied GX 40, the invoice for this car. *Tr.* at 6-7, 99, 102. An analysis of Eng's checking account failed to reveal any of the checks written to pay for the Mitsubishi. *Tr.* at 20.

A September 7, 1989 DMV computer check showed that the 1989 Dodge Van was registered to Eng. *Tr.* at 5; GX 386-87. In addition, agents in Interdonato's task force had observed this vehicle during surveillance. *Tr.* at 104-05. The DMV report allowed Interdonato to determine that Merion Leasing leased the vehicle to Eng and that New Hampshire Insurance Company insured the vehicle. *Tr.* at 12, 107-09. In November or December of 1989, Merion informed Interdonato that Tilden of New Jersey financed the Dodge. Documents recovered from the safe—various money orders—also pointed to Merion and Tilden of New Jersey. GX 50, 69, 71, 73, 75-76, 121, 211, 214, 319, 321, 325, 338. Tilden of New Jersey provided Interdonato with Eng's lease application, delivery receipt, payment schedule and lease payment history. The lease payment history showed that Eng

[11]These documents provided as follows: a $1000 money order was issued by Abacus Federal Savings Bank to Bay Ridge, GX 2; a $7,500 money order was issued by Bank Central Asia, GX 36; a $500 and a $1000 money order were issued by Chemical Bank, GX 42-43, 46; and an $8000 money order was issued by Manhattan Savings Bank, GX 154.

made a number of payments by money order. GX 329. A review of Eng's checking account revealed no lease payments.

* * *

The categories of evidence listed above presented essentially the same issue to this court. In each case, as a result of the concededly unlawful search of the French Ice Cream Parlor safe, the government obtained various money orders documenting how Eng paid his expenses to each of the listed entities. The government did not argue that documents actually seized from the safe were admissible at trial, however. Rather, the government argued in favor of—and presented at trial—deposit records from the banks of each of the above-referenced entities and money orders derived from these records, both of which were obtained via post-search and post-suppression hearing subpoenas.

These deposit records and evidence derived therefrom established the same fact that was shown by the illegally seized money orders: Eng's method of paying his expenses. However, by relying on documents obtained via subpoena rather than documents obtained directly from the safe, the government presented this court with a single inquiry: whether Interdonato would have discovered the *source* of this evidence—in other words, whether he *would have served* these subpoenas or had sufficient information to serve these subpoenas—absent the illegal search of the safe. It is important to note the difference here between using post-search investigative procedures to "validate" evidence obtained as a result of an illegal search, which is improper, *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747, 755 (9th Cir.1989), and using post-search subpoenas which inevitably would have been served. As defendant

acknowledged, the presence or absence of a post-search subpoena is irrelevant to the question of whether the government inevitably would have discovered the evidence absent the primary illegality. Here, the court was faced with determining only the key issue in inevitable discovery: whether, imagining the illegal search never took place, would the government have sought *this* particular information from *this* particular source. Since the answer was yes, the information was admissible because excluding that information would have had no deterrent purpose.

It is worth repeating here several general propositions that affect all of the categories before turning to the individual facts. First, Agent Interdonato had pre-search information that Eng was paying his expenses by using money orders. Second, the agent had pre-search access to Eng's credit card records and, as this court already has found, access to Eng's personal checking accounts as well. Third, in an expenditures investigation, precedent reveals that along with delving into the accused's bank accounts and property ownership, investigators routinely obtain information about vehicles, tax payments, utility payments, telephone payments and insurance payments. This fact is especially true when a payment is obligatory—for example, tax payments. And fourth, the time period that elapsed between when Agent Interdonato commenced the tax investigation of Eng and when the other agents conducted the illegal search was quite short; the tax investigation began in the summer of 1989, and the search occurred in October. Since Agent Interdonato demonstrated that he was in active pursuit of his leads at the time of the search, this case—and the subpoenas served in it—differ materially from cases in which investigations were at a standstill and subpoenas lay dormant when the illegality occurred. *See, e.g., Eng.* 971 F.2d at 860; *Roberts,* 852 F.2d at 676.

Applying these general propositions, this court implicitly found that the government proved by a preponderance of the evidence that it inevitably would have discovered the majority of the documents described above. First, Interdonato inevitably would have discovered the money orders to the IRS and the New York State Department of Taxation based on the nature of these debts and of this investigation. Second, Interdonato would have discovered the payments to Equitable, NYNEX, the Military Academy, and the automobile insurers, lessor and seller, because of the agent's pre-search knowledge of Eng's obligations for these expenses coupled with the fact that these expenses are routine sources of information and targets of investigation in expenditures cases. However, this court finds by hindsight that the money orders used to pay Eng's parking and building violations should have been suppressed, since Interdonato had no pre-search knowledge that Eng owed these moneys and it is not invariable that an individual would owe such moneys or that an expenditures investigation would seek out payments of this type. This court's failure to suppress this evidence constituted harmless error, as discussed below.

8. *Florida Property*

[14] The government learned from two sources, one pre-search, that Eng owned a residence at 15 Collingwood Lane in Palm Coast, Florida. First, documents in the French Ice Cream Parlor safe—specifically, a real estate tax bill describing the Florida property, GX 63, 70, and cancelled checks reflecting payments for utilities and real estate taxes, *Tr.* at 119-20; GX 318—showed this ownership. Second, the government learned of the existence of the Florida property from payments for utilities that appeared in Eng's checking accounts. *Tr.* at 38-39, 183. Interdonato also discovered that

Eng owned a boat in Florida from a State of Florida registration document found in the safe. *Tr.* at 44-45, 138; prior to the search, the government had no knowledge of Eng's ownership of this boat. *Tr.* at 138, 142.

After the search of the safe, Agent Interdonato ran a title search on the Florida home which revealed Eng as owner and also disclosed the name of the seller (Palm Coast Realty) and the seller's attorney. *Tr.* at 39-40, 120. The agent thereafter subpoenaed Palm Realty and Palm Coast Construction Company and obtained numerous documents from these entities. *Tr.* at 40, 121; GX 218-219, 237-40.[12] Records from Palm Coast Construction led the agent to Barnett Bank, the company's bank of deposit; a January 1990 subpoena to Barnett Bank turned up a deposit slip and various money orders paying to Palm Coast Realty and Palm Coast Construction. *Tr.* at 41-42, 121-22; GX 34-35, 225-236, 241-314.

Together, these documents revealed that Eng purchased his Florida residence on December 31, 1986; he paid the purchase price of $153,424.85 in cash, cashier's checks and 72 $1000 money orders. After determining that Eng did not have a mortgage on the property, Interdonato testified that he would have and did attempt to find out about expenses in connection with that property; he contacted the tax collector for the area but ultimately did not subpoena her bank of deposit because he already possessed money orders for tax

[12]These exhibits include the following: a cashier's report envelope (GX 218); a deposit ticket dated August 1, 1986 (GX 219); money orders drawn on Chinatown Federal Savings payable to Palm Coast Realty (GX 237) which were also found in the illegal search (GX 51-52); money order payable to Palm Coast Abstract and Title Company (GX 238); cashier's checks drawn on Global Union Bank payable to Palm Coast Construction Company (GX 239); and settlement statement for 15 Collingwood Lane (GX 240).

payments that had been seized from the safe. *Tr.* 43-44, 122-23; GX 63, 70, 318. From these steps, it is clear that Agent Interdonato followed ordinary, routine investigative techniques to acquire information about the Florida property. The question is whether the search of the safe tainted Interdonato's initial discovery of the property's existence or whether he would have discovered that existence notwithstanding the search.

The government argues that it inevitably would have discovered the existence of the Florida property based on an examination of Eng's checking accounts. *Tr.* at 38-39, 183. Agent Interdonato testified as follows about discovery of this property:

> Q: How did you learn about that residence?
> A: Several ways, records retrieved from the French Ice Cream Parlor, and in addition payments for utilities through Shu Yan Ng's checking account.
> Q: If you had been without benefit of the documents from the French Ice Cream Parlor would you have learned about the Palm Coast, Florida residence?
> A: Yes.
> Q: Why?
> A: Because I examined Shu Yan Ng's checking account and it reflected checks paid to utilities and real estate taxes for the home in Florida.
>
> I would investigate those expenses to see why he is paying the expenses.

Tr. at 38-39. Clearly, the checking account records—records that this court already had found to fall within the inevitable discovery rule—reflected utility payments. While utility and property tax payments in general might not ordinarily

be significant, in a tax evasion case of a suspect who resided in Staten Island, payments to Florida companies inevitably would have interested the agent responsible for the expenditures investigation, thereby triggering further inquiry. As described above, a tax expenditures investigation requires minute and exhaustive inquiry into all of a suspect's monetary transactions—both inflows and outflows. *Bianco,* 534 F.2d at 504-06. Ownership of houses, vehicles, and other property is routinely and invariably tremendous interest in such an investigation, and payments for taxes and utilities are essential means of establishing such ownership. *See id.; Terrell,* 754 F.2d at 1144-48. Agent Interdonato's testimony corroborated this general proposition. This court therefore found that sufficient evidence supported its conclusion of inevitable discovery of government exhibits 34-35, 63, 70, 218-19, 225-314, and 318; allowing admission of this evidence did not undermine the purpose of the exclusionary rule in deterring improper police conduct.

Interdonato investigated Eng's boat ownership as follows. First, he checked with the Florida Department of Natural Resources which revealed that Eng purchased his boat from Flagler County Marine. Interdonato thereafter obtained the purchase agreement for the boat from Flagler; he also learned that Flagler banked with Prosperity Bank of St. Augustine. *Tr.* at 45-46; GX 94. Subpoenas to the bank in January of 1990 revealed money orders used to pay for the boat. *Tr.* at 46, 141-42, 183-91; GX 95-104. Although these post-search investigative procedures were routine and legitimate, the question again is whether Interdonato would have learned of the particular property in the first place since after-the-fact investigatory techniques may not be used to "validate" information derived from an unlawful search. *Eng,* 971 F.2d at 861 (*citing Center Art Galleries,* 875 F.2d at 755). The government contends that because the house in

Florida had a marina, Agent Interdonato ultimately would have discovered the boat even without information from the safe. *Tr.* at 79; 177-79. This court should have rejected this argument as too speculative and therefore exhibits 94-104 should have been suppressed. However, while these documents, like the money orders for parking and building violations, should have been suppressed, their introduction into evidence was harmless error since the other evidence at trial provided overwhelming proof that Eng was guilty of tax evasion.

CONCLUSION

A faithful and sensitive application of the exclusionary rule led this court to conclude that the government had established by a preponderance of the evidence that the information that defendant sought to suppress would ultimately and inevitably have been discovered and acquired by lawful means through independent sources. That conclusion was supported by the facts, known to the government prior to the unlawful search, which gave definition to the areas of inquiry customarily and methodically pursued in a tax investigation focusing on the expenditures method of proof. That conclusion was also supported by the "direct casual relationship and reasonably close temporal relationship" that existed "between what was known and what had occurred prior to the government misconduct" and the evidence that would have been inevitably discovered. *Eng*, 971 F.2d at 859. It is important to note in this regard that Agent Interdonato's investigation commenced in the summer of 1989. He was well along the road of subpoenaing bank and other records when the unlawful search occurred within less than two months after his investigation began. This was not a case, unlike *Roberts*, in which outstanding subpoenas were

lying dormant for months prior to the unlawful search with no prospect of producing results. *Eng*, 971 F.2d at 860.

I should also add that although I am mindful that "inevitable discovery analysis inevitably involves some degree of speculation," I have endeavored to avoid such speculation and to "view[ ] affairs as they existed at the instant before the unlawful search [and determine] what *would have happened* had the unlawful search never occurred." *Eng*, 971 F.2d at 861. For the foregoing reasons and based on the above particularized findings of fact, I concluded that Eng's motion to suppress was properly denied.

SO ORDERED.

APPENDIX C—Opinion of United States Court of Appeals for the Second Circuit, Decided June 15, 1993.

997 F.2d 987 (2nd Cir. 1993)

UNITED STATES of America, Appellee,

v.

Shu Yan ENG, also known as Ah Shu; Cho-Kuen Wong; King Albeo Kong; Foo Wing Yam; Sue Sang Ong; Hon Keung Ng, Defendants,

Shu Yan ENG, also known as Ah Shu, Defendant-Appellant.

No. 1151, Docket 91-1683.

United States Court of Appeals,
Second Circuit.

Submitted May 7, 1993.
Decided June 15, 1993.

Defendant was convicted of tax evasion in connection with drug-related activity by the United States District Court for the Eastern District of New York, Israel Leo Glasser, J. Defendant appealed. The Court of Appeals, 971 F.2d 854, vacated and remanded. On remand, the District Court found that evidence would have been inevitably discovered, 819 F.Supp. 1198. Defendant appealed. The Court of Appeals, Miner, Circuit Judge, held that disputed evidence concerning bank accounts, use of money orders, and buildings or properties which defendant owned would inev-

itably have been discovered during ongoing tax evasion investigation.

Affirmed.

1. Criminal Law 394.1(3)

"Inevitable discovery doctrine" is exception to exclusionary rule and allows unlawfully obtained evidence to be admitted at trial if government can establish by preponderance of evidence that information ultimately or inevitably would have been discovered by lawful means. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law 1158(4)

District court's factual findings on suppression motion are reviewed under clearly erroneous standard.

3. Criminal Law 394.1(3)

Tax evasion investigation of defendant involved in narcotics trade was active and ongoing before illegal search needed for inevitable discovery doctrine exception of exclusionary rule to apply where defendant was charged with importing and distributing more than 800 pounds of heroin before search was conducted and scope of investigation necessarily would have included determination source of funds used to purchase known assets. U.S.C.A. Const.Amend. 4.

4. Criminal Law 394.1(3)

Tax evasion investigation of defendant's drug-related activity would inevitably have discovered defendant's personal bank account by lawful means, even though account numbers were obtained during unlawful search of defendant's safe. U.S.C.A. Const.Amend. 4.

5. Criminal Law 394.1(3)

Defendant's ownership of building would have been inevitably discovered by lawful means during investigation for tax evasion in connection with defendant's drug-related activity where, prior to illegal search of defendant's safe, government knew names of seller of building, seller's attorney and property was subject to mortgage, and holder of mortgage. U.S.C.A. Const.Amend. 4.

6. Criminal Law 394.1(3)

Inevitable discovery doctrine applied to money orders used by defendant prosecuted for tax evasion in connection with drug-related activity to pay expenses, even though defendant's records of orders were discovered during unlawful search of defendant's safe, where government knew that defendant paid expenses by using the money orders and had access to defendant's credit card records and personal checking accounts prior to search. U.S.C.A. Const.Amend. 4.

7. Criminal Law 394.1(3)

Tax evasion defendant's ownership of condominium would have been inevitably discovered by lawful means,

even though unit number and identities of seller, seller's attorney and defendant's attorney were discovered during unlawful search of defendant's safe, where unit number of condominium was not necessary to conduct title search. U.S.C.A. Const.Amend. 4.

8. Criminal Law 394.1(3)

Defendant's ownership interest in building would inevitably have been discovered during investigation for tax evasion in connection with drug-related activity, even though particulars of purchase were discovered during unlawful search of defendant's safe, where government had information concerning building and parties involved prior to search and sought forfeiture of building by filing complaint in rem against property on day of unlawful search. U.S.C.A. Const.Amend. 4.

9. Criminal Law 394.1(3)

Ownership interest in restaurant and other business by tax evasion defendant would have been inevitably discovered by lawful means, even though information was obtained during unlawful search of defendant's safe, where government possessed multiple sources for disputed information prior to unlawful search, each of which was inevitable target of government subpoenas. U.S.C.A. Const.Amend. 4.

10. Criminal Law 394.1(3)

Discovery of tax evasion defendant's ownership of house and boat in Florida would inevitably have been discovered by lawful means, despite fact that evidence of ownership

was discovered during unlawful search of defendant's safe, where ownership would have been discovered when reviewing utility and property tax payments reflected in checking account records which were lawfully obtained. U.S.C.A. Const.Amend. 4.

Margaret E. Alverson, New York City, for defendant-appellant.

Patricia A. Pileggi, Asst. U.S. Atty., New York City (Mary Jo White, U.S. Atty., E.D. of N.Y., New York City, of counsel), for appellee.

Before: MINER and McLAUGHLIN, Circuit Judges, and MARTIN, District Judge.*

MINER, Circuit Judge:

Defendant-appellant Shu Yan Eng appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Glasser, J.). Eng was convicted, after a jury trial, of tax evasion for the years 1986 through 1988, in violation of 26 U.S.C. § 7201. The district court sentenced Eng to a term of imprisonment of forty-eight months but granted bail pending appeal. The conviction followed the district court's denial of Eng's motion to suppress certain records obtained by the government in an unlawful search and other evidence claimed by Eng to have been derived from materials discovered in that unlawful search. The district court based its denial of Eng's motion on the "inevitable discovery" doctrine, an excep-

*The Hon. John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

tion to the exclusionary rule. *See Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

In an opinion filed on July 28, 1992, we vacated the judgment of conviction and remanded the case to the district court "for particularized findings as to the manner in which, if at all, each piece of evidence challenged by Eng, and said by the government to be admissible under the inevitable discovery exception, would have been inevitably discovered." *United States v. Eng*, 971 F.2d 854, 856 (2d Cir.1992). We retained jurisdiction of the appeal pending the completion of the district court's findings. *Id.* at 864. The detailed findings required by our remand were provided to us in a seventy-five page "Memorandum and Order" dated March 31, 1993. *See United States v. Eng*, 819 F.Supp. 1198, 1208 (E.D.N.Y.1993).

After considering the district court's factual determinations and reviewing its legal conclusion of inevitable discovery, we accept the particularized findings of the district court and reinstate and affirm the judgment of conviction heretofore entered in the district court.

BACKGROUND

Because the background facts of this case are provided in detail in our prior opinion, *United States v. Eng*, 971 F.2d 854 (2d Cir. 1992) (*"Eng I"*), we will assume familiarity with them and present a truncated version of the events. In February of 1989, the Drug Enforcement Administration ("DEA") and the Internal Revenue Service ("IRS") began an investigation of Eng for suspected narcotics and money laundering violations based on information provided by confidential informants, who indicated that Eng imported narcotics from the Far East and laundered money through various businesses. As is customary in such matters, the IRS

expanded its investigation to include the subject of tax evasion. Commencing in September of 1989, IRS Agent Thomas Interdonato conducted the tax evasion aspect of the investigation.

Using the "expenditures method" of proof, Interdonato began a thorough investigation of Eng's assets, sources of money and cash receipts and expenditures. Prior to the unlawful search of Eng's safe, which produced various incriminating documents and revealed useful information, Interdonato had uncovered information about Eng's personal bank accounts and about the following properties in which Eng had an interest: 134 Gauldy Avenue, 141 Division Street, and 26 Bowery. Interdonato also had information regarding Eng's interest in a business known as the Chinese Moon Palace Restaurant.

On October 18, 1989, Eng was arrested in connection with an indictment charging him with administering a continuing criminal enterprise, money laundering and other narcotics violations. Eng, however, was not charged with tax evasion at that time. On the day of Eng's arrest, authorities seized the 26 Bowery building, the location of the Chinese Moon Palace Restaurant and the French Ice Cream Parlor. Eng's personal safe in the French Ice Cream Parlor unlawfully was searched without a warrant. The materials seized from the safe included: cancelled checks from various bank accounts; customer records of money orders; documents revealing the unit number of a condominium located at 141 Division Street; a checkbook of a corporation called World Express International, Inc.; documents revealing that Sol Leitner and Frieda Grant were the previous owners of 26 Bowery Corp.; and documents evidencing ownership of property and a boat in Florida.

After the unlawful search, Interdonato continued his investigation of Eng by issuing subpoenas to banks and other

involved entities and by performing title searches of some of Eng's properties. In April of 1990, a superseding indictment, which included three tax evasion counts with respect to the 1986, 1987 and 1988 tax years, was returned. Much of the evidence the government intended to offer at trial to prove the tax violations, Eng argued, either was obtained from the unlawful search or was derived from information that was discovered as a result of the unlawful search. Eng made a motion to suppress the evidence, and the district court denied the motion. Relying on *Nix v. Williams,* the district court concluded that the inevitable discovery doctrine applied and admitted all of the challenged evidence. After a jury trial, Eng was convicted only of the tax evasion charges.

In *Eng I,* we were concerned that there was a possibility that the government's tax evasion investigation was not sufficiently active or developed prior to the illegal search to support the government's claim of inevitable discovery and that the evidence was tainted because the investigation was triggered or catalyzed by the unlawfully obtained information. Moreover, we concluded that, even if the district court determined that the investigation had been active and ongoing, the district court would still be required to analyze and explain in detail how each piece of evidence inevitably would have been discovered absent the illegal search of Eng's safe. After setting forth our concerns as they related to specific assets, we vacated Eng's judgment of conviction and remanded the case to the district court for particularized findings supporting the district court's conclusion that the challenged evidence inevitably would have been discovered. As this panel retained jurisdiction of the appeal pending completion of the district court's findings, we now consider those findings.

DISCUSSION

A. *Inevitable Discovery Doctrine*

[1] The inevitable discovery doctrine is an exception to the exclusionary rule and allows unlawfully obtained evidence to be admitted at trial if the government can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix,* 467 U.S. at 444, 104 S.Ct. at 2509. "For inevitable discovery to be demonstrable, it must be the case that the evidence would have been acquired lawfully through an independent source absent the government misconduct." *Eng I,* 971 F.2d at 859; *see Murray v. United States,* 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988); *see also Nix,* 467 U.S. at 448, 104 S.Ct. at 2511. "The exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred." *Eng I,* 971 F.2d at 861 (emphasis in original). "[P]roof of inevitable discovery 'involves no speculative elements but focuses on *demonstrated historical facts capable of ready verification or impeachment* and does not require a departure from the usual burden of proof at suppression hearings.' " *Id.* at 859 (emphasis in *Eng I*) (quoting *Nix,* 467 U.S. at 444 n. 5, 104 S.Ct. at 2509 n. 5).

[2] We review the district court's factual findings under a clearly erroneous standard. *See United States v. Mast,* 735 F.2d 745, 749 (2d Cir.1984); *see also United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in U.S. Currency,* 955 F.2d 712, 721 (D.C.Cir. 1992).

B. *The District Court's Findings*

1. *Active and Ongoing Tax Investigation*

The district court found that, at the time of the unlawful search, the government was involved in an ongoing investigation of Eng's narcotics violations, which necessarily and customarily included an investigation of his finances in relation to the proceeds of the narcotics trade. Such an inquiry would typically, and did in fact, lead to an investigation of Eng's tax returns. The district court found: "That the indictment was thereafter superseded to include tax counts did not negate the ongoing nature of the investigation in October of 1989." *United States v. Eng,* 819 F.Supp. 1198, 1211 (E.D.N.Y.1993) (*"Eng II"*). We agree.

To support this finding, the district court referred to Agent Interdonato's testimony and documents admitted at the suppression hearing that related to the status of the tax evasion investigation at the time of Eng's arrest in October of 1989. The district court relied particularly on: Interdonato's testimony that he commenced the investigation in the summer of 1989 and discovered from public records that Eng had purchased a building at 26 Bowery on behalf of a corporation of which he was president; information from the title search of 26 Bowery; the request of Eng's personal and corporate tax returns; the preparation of various subpoenas; and the fact that other agents on the DEA Southeast Asian Task Force were reporting information about Eng's assets to Interdonato.

To further support its findings, the district court made the following observation regarding the nature of tax evasion investigations in general:

> [I]n order to establish the type of behavior that constitutes tax evasion, the government must engage in a lengthy and detailed analysis of the taxpayer's resources and expenditures; thus, although the tax evasion investigation of Eng was still in its formative stages when the illegal search of the safe occurred, the government's motivation to pursue that investigation was compelling, and the agents' behavior in the Summer and Fall of 1989 was consistent with their active pursuit of this investigation.

Id. at 1212. Specific to this investigation, the district court noted the short time span between the initiation of the investigation and the illegal search and the degree of investigative activity during that period (i.e., there were no subpoenas lying dormant for months prior to the illegal search as in *United States v. Roberts,* 852 F.2d 671 (2d Cir.), *cert. denied,* 488 U.S. 993, 109 S.Ct. 556, 102 L.Ed.2d 583 (1988)). Thus, the district court concluded that "the government's investigation was in a sufficiently advanced stage to compel the finding that 'alternate means of obtaining the evidence' were 'in existence and, at least to some degree, imminent, if yet unrealized' and that 'the evidence produced by the investigation was simply the normal output of that investigation.' " *Eng II,* 819 F.Supp. at 1212 (quoting *Eng I,* 971 F.2d at 861). In sum, the district court found, "the evidence supports this court's original conclusion that the tax evasion investigation was neither spurred nor catalyzed by the illegal search." *Eng II,* 819 F.Supp. at 1212.

Eng contends that the district court has engaged in speculation, rather than in an analysis of the demonstrated historical facts in this case, by relying on the customary practices and standard procedures of tax evasion investigations

to support its conclusion of inevitable discovery. *See Nix,* 467 U.S. at 457 n. 8, 104 S.Ct. at 2516 n. 9 (Stevens, J., concurring) (the inevitable discovery rule requires a court to assess "the scope of the ongoing investigation which can be objectively verified or impeached"). We think that this argument is without merit.

[3] It is evident from the historical and objective facts of Interdonato's investigation before the unlawful search that the agent was immersed in an active and ongoing investigation of Eng that included an examination of financial matters as well as tax returns. Eng was charged with importing and distribution more than 800 pounds of heroin and deriving substantial income from those activities. Accordingly, the government was motivated to obtain additional evidence of Eng's narcotics activities and to seek forfeiture of the proceeds derived from his distribution of heroin. *See United States v. 228 Acres of Land & Dwelling Located on Whites Hill Road in Chester, Vt.,* 916 F.2d 808, 813-814 (2d Cir.1990) (claimant-appellant's "attempts to conceal his income and, . . . his unexplained accumulation of the substantial cash used to acquire the forfeited parcels, and his demonstrably false claim that he had paid for these parcels with income from businesses on which the 'income taxes were paid' " were factors establishing probable cause that properties were proceeds traceable to illegal drug activities, as required for civil forfeiture under 21 U.S.C. § 881,) *cert. denied,* 498 U.S. 1091, 111 S.Ct. 972, 112 L.Ed2d 1058 (1991); *United States v. St. Prix,* 672 F.2d 1077, 1084 (2d Cir.) ("In a narcotics prosecution, it is well established that the government may introduce evidence of cash purchases coupled with tax evidence tending to show that a defendant had no legitimate source of cash."), *cert. denied,* 456 U.S. 992, 102 S.Ct. 2274, 73 L.Ed.2d 1287 (1982); *see also*

United States v. Briscoe, 896 F.2d 1476, 1500 (7th Cir.) ("It is well settled that in narcotics prosecutions, a defendant's possession and expenditure of large sums of money, as well as his or her failure to file tax returns, are relevant to establish that the defendant lacked a legitimate source of income and that, in all probability, the reason for the failure to report this income is due to the defendant's participation in illegal activities."), *cert. denied*, 498 U.S. 863, 111 S.Ct. 173, 112 L.Ed.2d 137 (1990). The government ultimately did in fact initiate forfeiture proceedings against 26 Bowery and the French Ice Cream Parlor. These proceedings were initiated on the same day as Eng's arrest.

Furthermore, an analysis of the "demonstrated historical facts" leads to the conclusion that the scope of the investigation necessarily would have included a determination of the source of funds used to purchase the known assets. *See Eng I*, 971 F.2d at 861. Those demonstrated facts were: (1) the government, prior to the illegal search, was aware of substantially all of Eng's major assets (except for the Florida properties) and was aware that Eng used money orders for expenses; and (2) Interdonato already had obtained Eng's personal and corporate tax returns. A careful review of Eng's tax returns logically mandated an investigation of Eng's sources of funds. Although Interdonato participated in the narcotics and money laundering investigation that began in February of 1989, he testified that he commenced his tax evasion investigation in the summer of 1989, when he discovered through the examination of public records that Eng had purchased a building at 26 Bowery on behalf of a corporation of which he was president. Thus, the government's tax evasion investigation was not " 'trigger[ed]' " or " 'catalyzed' " by the information unlawfully gained by the illegal search. *Id.* at 861 (quoting *United States v. Falley*, 489 F.2d 33, 41 (2d Cir.1973) and *United States v. Cole*, 463

F.2d 163, 173-74 (2d Cir.), *cert. denied*, 409 U.S. 942, 93 S.Ct. 238, 34 L.Ed.2d 193 (1972)).

Because the tax evasion investigation sufficiently was developed prior to the search of Eng's safe to support the government's inevitable discovery claim, we proceed to our second inquiry—whether the discovery of each piece of challenged evidence " 'would have been' more likely than not 'inevitable' absent the search of Eng's safe." *Eng. I*, 971 F.2d at 862 (quoting *Nix*, 467 U.S. at 444, 104 S.Ct. at 2509).

2. Particularized Findings for Challenged Evidence

a. Eng's Personal Bank Accounts

[4] Interdonato obtained the personal tax returns of Eng and his wife well before the illegal search of the safe. The returns revealed that Eng maintained personal bank accounts at Bowery Savings Bank, Manhattan Savings Bank, Hang Seng Savings Bank and National Westminster Bank, but they did not include the bank account numbers. The illegal search revealed the bank account numbers, which we presumed were used in the post-search subpoenas. *See Eng I*, 971 F.2d at 862.

The district court found that evidence in addition to the tax returns, obtained before the illegal search, confirmed the existence of the bank accounts: the mortgage application to Long Island Savings Bank for 134 Gauldy Street confirmed the existence of the Manhattan Savings Bank account and also indicated the existence of a Citibank account. The district court found that the subpoena served on Manhattan Savings Bank was drafted prior to the illegal search and that information obtained from that subpoena should not have been suppressed. Concerning documents received from the

other banks, the district court found three reasons for concluding that subpoenas would have been served even if the search never had taken place: (1) it was the routine course taken in such an expenditure investigation; (2) Interdonato's pre-search notes indicated that he would obtain such subpoenas; and (3) Interdonato testified that he would have subpoenaed the banks. *See Eng II*, 819 F.Supp. at 1213-14.

Eng argues that the district court erred in relying on Interdonato's "intention" to subpoena Eng's banks, as evinced by his notes from an August 16, 1989 meeting, to establish that he inevitably would have contacted them. *See Eng I*, 971 F.2d at 861; *United States v. Cherry*, 759 F.2d 1196, 1205 n. 10 (5th Cir.1985) (the "mere intention to use legal means" does not satisfy a finding of inevitability), *cert. denied*, 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987). Rather, Eng asserts, we must inquire whether Interdonato *would* have carried out that intent. In light of: (1) Interdonato's notes and testimony; (2) the fact that one subpoena to Bowery Bank was served prior to the search and one subpoena to Manhattan Savings Bank was drafted prior to the search; (3) the nature of narcotics and tax investigations; and (4) the facts already uncovered in this particular investigation, we agree with the district court that Interdonato indeed would have subpoenaed the other banks.

In response to our specific inquiry as "to what extend possession of an account number makes more likely a satisfactory response to a bank subpoena," *Eng I*, 971 F.2d at 862, the district court found: "banks will respond to subpoenas based solely on a name or on a name in conjunction with a social security number or employee identification number." *Eng II*, 819 F.Supp. at 1215. Since Interdonato knew Eng's social security number and was aware of all of the personal accounts through the tax returns and mortgage application acquired prior to the search, the district court

concluded that Interdonato inevitably would have subpoenaed and received the same documentation and information gained from using the account numbers revealed in the illegal search.

Although it was true that Bowery Bank received a subpoena without account numbers for information concerning any Eng accounts and responded that it had nothing on file, the district court found that this occurrence was due to isolated and unique circumstances—there was evidence that Eng had closed the accounts before the subpoena was issued—and all banks do not follow the same procedures as Bowery Bank in regard to closed accounts. Moreover, the district court noted that the subpoena to Manhattan Savings Bank also contained no reference to an account number but nevertheless was effective in producing information. *See id.* at 1214. Thus, the district court sufficiently has addressed our concerns with regard to Eng's personal bank accounts, and we find that it did not err in its factual findings or in its conclusion that the government inevitably would have subpoenaed and obtained information from the banks where Eng maintained accounts.

b. 134 Gauldy Avenue

[5] Prior to the illegal search, Interdonato knew from Eng's 1988 tax returns that Eng resided at 134 Gauldy Avenue and from a title search that Long Island Savings Bank held a mortgage on the property. A pre-search subpoena served on the bank revealed a mortgage application, a payment history and the name of the mortgage broker. The pre-search title examination revealed the name of the seller, Woodmont Development Corp., and the seller's attorney, Albert Temkin. The illegal search produced records of various money orders payable to Long Island Savings Bank for

mortgage payments. From a post-search subpoena of Woodmont and Temkin, Interdonato received a closing statement, a customer ledger and various bank money orders and checks paid to Woodmont.

With respect to the customer records of the money orders used by Eng to pay Long Island Savings Bank, the mortgagee of the 134 Gauldy Avenue property, we were concerned with the government's chain of reasoning to find inevitable discovery because (1) it presumed that lawful discovery of the bank account records was inevitable; (2) Interdonato's testimony was conflicting as to whether he had information prior to the illegal search that Eng was using money orders to pay for expenses; and (3) the record was "unclear as to whether Interdonato possessed, or specifically how he would have acquired," information as to "where and on what date the money orders were deposited after receipt by the payee"—the information that Interdonato "seem[ed] to indicate in his testimony" was required to discover the money orders used by Eng to pay Long Island Savings Bank. *See Eng I,* 971 F.2d at 862-63.

Concerning our first inquiry, we already have concluded that the records of Eng's bank accounts inevitably would have been discovered. With regard to our second inquiry, the district court found that Interdonato did possess pre-search information concerning Eng's use of money orders and that his testimony on this issue was not conflicting. The district court found that: prior to the search, Interdonato was informed by other agents that Eng was using money orders; and, after the search, Interdonato obtained the same information from his personal interviews with confidential informants. *See Eng II,* 819 F.Supp. at 1210.

Regarding our third concern, the district court found that we "incorrectly believed that Interdonato's testimony indicated that 'in order to discover money orders such as those

used by Eng to pay Long Island Savings Bank, one must know where and on what date the money orders were deposited after receipt by the payee.' " *Id.* at 1217. The district court found that, in order to obtain information about a money order from the bank of deposit, rather than from the issuing bank, one needs only the approximate date of payment and the bank of deposit account number. With regard to the specific money orders payable to Long Island Savings Bank, the district court noted that "the government did not seek to admit any of the money orders for the 134 Gauldy residence into evidence at trial. This court addresses the admissibility of these documents only insofar as they are affected by the issue of money orders generally and declines to make specific findings as to the documents' admissibility." *Id.* at 1218 n.6. although it declined to make findings concerning the money orders paid to Long Island Savings Bank, the district court did find that the documents relating to the closing of 134 Gauldy Avenue inevitably would have been discovered.

Eng's bank records showed that he was not paying his mortgage by check. Given that the tax expenditures method of proof requires a showing of assets and payments and that Interdonato had confidential information that Eng had been using money orders to pay his expenses, this court found that, even absent the illegal search, the government inevitably would have discovered . . . documents relating to the closing on 134 Gauldy [] that were in the possession of Woodmont and Temkin.

Id. at 1217-18

Since Interdonato, prior to the search, knew the names of the seller (Woodmont) and of the seller's attorney (Temkin) and knew that the property was subject to a mortgage held

by Long Island Savings Bank, we agree that Interdonato would have subpoenaed Woodmont, Temkin and Long Island Savings Bank and inevitably would have discovered the closing documents. That Interdonato did not issue these subpoenas until after the search does not negate the fact that his use of the expenditures method of proof would have led him to subpoena these sources so that he could determine how Eng paid for the property. With respect to the money orders payable to Long Island Savings Bank, we need not reach the issue of their inevitable discovery because the district court did not receive them in evidence and the agent inevitably would have discovered the closing documents without knowledge of these specific money orders. We address our broader concern about the inevitable discovery of other money orders below.

c. The Money Orders

[6] Prior to remand, the record was unclear as to how the government inevitably would have discovered "all the various money orders admitted against Eng." *Eng I*, 917 F.2d at 863. The illegal search of Eng's safe revealed records of money orders reflecting payments for: state and federal taxes, parking and building violations, life insurance, tuition for the New York Military Academy, telephone bills and automobiles. At trial, the government did not argue that the records of money orders actually seized from the safe were admissible. The government offered as evidence both the deposit records from the banks where the money orders were deposited by the entities receiving payment and copies of the money orders revealed by those records. The deposit records and money orders were obtained via post-search subpoenas. The district court found that the deposit records and the money orders established the same fact that was

shown by the illegally seized money order records—that Eng used money orders to pay his expenses.

In determining whether each of the money orders used by Eng for payment of expenses inevitably would have been discovered, the same question arises: whether Interdonato would have served the subpoenas necessary to obtain the deposit records of the banks where the money orders were deposited. With respect to each piece of evidence, the district court made the following particularized findings: the money orders payable to the IRS and the New York State Department of Taxation inevitably would have been discovered because of the nature of these debts and the nature of the investigation; and Interdonato inevitably would have discovered the payments to Equitable Life, NYNEX and the New York Military Academy and payments for automobile expenses because the agent had knowledge prior to the search of these obligations and expenses and because these expenses are both routine sources of information and targets of investigation in expenditures cases. *Eng II*, 819 F.Supp. at 1224. The district court also found that the money orders used to pay Eng's parking and building violations should have been suppressed because Interdonato had no knowledge prior to the search that Eng incurred these liabilities and because it was not inevitable that an expenditures investigation would reveal those kinds of payments. However, the district court found the admission of this evidence to be harmless. *See id.* at 1224.

We agree with the district court's finding that Interdonato would have subpoenaed the banks that received Eng's payments for taxes, life insurance, tuition, phone bills and automobiles because each of these expenses was known to Interdonato prior to the search. *See id.* at 1224 (detailing evidence supporting Interdonato's knowledge of these expenses prior to the search). Given (1) that Interdonato knew

from a confidential informant that Eng paid his expenses by using money orders; (2) that Interdonato had access to Eng's credit card records and personal checking accounts prior to the search; (3) that expenditures investigations require the agent to delve into the taxpayer's bank accounts and property ownership, thereby routinely obtaining information about vehicles, tax payments, utility payments and insurance payments; (4) that Interdonato only had commenced his tax investigation of Eng a short time before the illegal search; and (5) that we already have found that Interdonato actively was pursuing his tax investigation of Eng prior to the illegal search, we conclude that Interdonato would have issued the required subpoenas and inevitably would have discovered the money orders. With respect to the money orders for the parking and building violations, we agree with the district court that they inevitably would not have been discovered but that the admission of this evidence was harmless.

d. 141 Division Street

[7] Prior to the illegal search, Interdonato had obtained confidential information that Eng owned a condominium at 141 Division Street in New York City. From the illegal search of the safe, documents were obtained that: confirmed Eng's ownership of the condominium; revealed the unit number of the condominium; and indicated the identities of the seller, the seller's attorney and Eng's attorney. A subsequent title search of the property revealed the same information. A subpoena served on these parties produced documents showing that Eng purchased the condominium in December of 1988 for $200,000.

With respect to this property, we were hesitant to apply the inevitable discovery doctrine because we found that it

was "not clear whether Interdonato would have taken action on the basis of his pre-search information [from a confidential source], for it appears that this information was not even written down." *Eng I*, 971 F.2d at 863. The district court found that, although Interdonato did not write the address down, his testimony that he knew about the condominium a couple of days before Eng's arrest was "credible and fully consistent with his specific recollection of details surrounding his acquisition of this information." *Eng II*, 819 F.Supp. at 1219. The district court concluded that information concerning the property inevitably would have been discovered without the search of the safe because: (1) "Interdonato ultimately would have investigated this information about the property since the very purpose for his tax evasion investigation was to determine where Eng's money was going"; and (2) a unit member (which Interdonato did not have) was not necessary to conduct a title search—a search using only an address and the owner's name would have revealed that Eng owned unit number three. *Id.* at 1219. We find that the district court's analysis of Interdonato's recollection of details, the purpose of the investigation, and the fact that the unit number was not necessary to conduct the title search constituted a sufficient focus on demonstrated facts capable of ready verification to make a showing of inevitable discovery.

e. 26 Bowery

[8] Prior to the seizures at the French Ice Cream Parlor, Interdonato knew from a confidential source, a title search of the building at 26 Bowery, and tax returns filed by Bowery Mansion, Inc. and Chinese Moon Palace Restaurant, Inc.: that Eng had an interest in 26 Bowery; that he conducted a business, Chinese Moon Palace Restaurant, at

that location; that Eng was president of Bowery Mansion, Inc., the corporation that purchased the property; that the name of the selling corporation was 26 Bowery Corp.; that the name of the seller's attorney was Ronald De Petris; and that the names of Eng's attorneys were Frank Lam and Hwa Min Hsu. The illegal search revealed the names of the owners of 26 Bowery Corp.—Sol Leitner and Grant in November of 1989 produced deposit slips, deeds, checks and a mortgage note.

A subpoena to De Petris produced closing statements and checks drawn on World Express International Holding Corp. A subpoena to Lam produces an escrow ledger and various checks relating to 26 Bowery. The title search, tax returns and documents provided by the seller and De Petris reflected that 26 Bowery was purchased in December of 1986 for 1.7 million dollars, half of which was paid at the closing and the other half of which was paid in the form of a mortgage given to the seller. The district court found that this evidence certainly would have been uncovered absent the illegal search, since "the 26 Bowery building was an important source of information going to Eng's tax responsibilities." *Id.* at 1220.

We expressed our concern that:

> [t]he important evidence admitted at trial concerned closing information on the price paid and amount borrowed by Eng to purchase the 26 Bowery building. At least some of the closing information admitted at trial may have been provided only by Leitner and Grant. To the extent that Leitner and Grant were the source of the closing information, inevitable discovery of the evidence in their possession becomes more difficult to prove because their identities were discovered in the search of the safe, and alternate

> routes to discovery of these parties may be attenuated.

Eng I, 971 F.2d at 863. The district court found that we had "overlooked evidence from sources other than Interdonato which clearly reveals that misconception." *Eng II*, 819 F.Supp. at 1220. This evidence establishes: (1) that on the day of Eng's arrest, the government sought forfeiture of the 26 Bowery building by filing a complaining *in rem* against the property; and (2) that the complaint reflected the government's awareness of the identities and addresses of Leitner and Grant and of the fact that they had taken back a mortgage from Eng. *See id.* at 1220. Since Interdonato and the government had information concerning the building and the parties involved prior to the search, the district court concluded that all of the information relating to Eng's purchase of 26 Bowery would have been discovered. Considering that all information concerning 26 Bowery would have been essential to Interdonato's tax evasion investigation and that Eng's interest in the property was known prior to the unlawful search, it was inevitable that the unlawfully obtained information would have been discovered.

f. Chinese Moon and World Express

[9] Intertwined with the purchase of 26 Bowery was information relating to Eng's other businesses. Information concerning Chinese Moon was obtained from a confidential source. An examination of corporate tax returns and a treasury deposit review revealed that his business had an account at National Westminster Bank.

In August of 1989, prior to the search, Interdonato subpoenaed National Westminster Bank and obtained monthly statements, deposit items, deposit slips, corporate resolu-

tions, deposit slips, corporate resolutions, debit advice reflecting transfers to the account and a signature card. These records showed that cashier's checks, totaling $140,000 and issued by Hang Seng Bank, had been deposited in the account in June and September of 1987. In response to a subpoena issued shortly after Eng's arrest, the bank provided Interdonato with copies of the checks.

In November of 1989, subsequent to the illegal search, Interdonato subpoenaed National Westminster for records pertaining to the French Ice Cream Parlor and to World Express International. Interdonato learned of the existence of World Express through documents received from Leitner, Grant and Wang F. Luk, an accountant known by the government prior to the search, as well as from the National Westminster checkbook discovered in Eng's safe. As a result of the National Westminster subpoena, the agent obtained a series of cashier's checks and wire transfers depositing funds from Wing Lung Bank, Kwantung Bank, and BCCI into the World Express account.

Initially, we found it "possible that discovery of the mere existence of World Express was inevitable [from pre-search known sources such as Luk and Lam, who knew of World Express]. . . . [but] a case of inevitable discovery of the information produced by Wing Lung Bank, Kwantung Bank, and BCCI would appear to involve a far more attenuated chain of events." *Eng I*, 971 F.2d at 863. Considering the district court's findings that business accounts are a routine source of information in tax expenditure cases and that Interdonato possessed multiple sources for this information prior to the search, each of which was an inevitable target of government subpoenas, we conclude that the discovery of World Express indeed was inevitable. With respect to the specific information gained from Wing Lung Bank, Kwantung Bank, and BCCI, we also find that the

information inevitably would have been discovered, since it is apparent from the district court's findings that investigations of this nature involve a thorough analysis of all expenditures and receipts of funds into business accounts. Once the investigation uncovered the receipt of funds from these banks, it was inevitable that the government would have issued subpoenas to each of the three banks. In the same regard, the illegally obtained information concerning Chinese Moon also inevitably would have been discovered since the government had information prior to the illegal search regarding Eng's interest in Chinese Moon.

g. The Florida Properties

[10] In considering the record before remand, we found that "[t]he only connection between Interdonato and the Florida properties evident in the record is that provided by the documents found in the safe." *Id.* at 863. These documents identified the address of a house in Florida and Eng's ownership of a boat—information that facilitated a title search and further subpoenas, which led to discovery of the evidence admitted at trial. We expressed further concern that, if our understanding of the record was confirmed by the district court, if would be difficult for the government to meet its burden of proving inevitable discovery of the Florida properties. *Id.* at 864.

The district court found that the government learned from two sources about the house at 15 Collingwood Lane in Palm Coast, Florida: (1) the illegal search produced a real estate tax bill for the property and cancelled checks reflecting payments for utilities and real estate taxes, all of which showed the ownership; and (2) Eng's checking accounts revealed Florida utility payments, which indicated that Eng had an interest in the property. *See Eng II*, 819 F.Supp. at

1225. Concerning the boat, the illegal search revealed a State of Florida registration document, which not only informed the government of the boat's existence but also indicated ownership. Following his search of the safe, Interdonato ran a title search and issued subpoenas, which resulted in acquiring the additional information regarding the Florida property.

The district court found that the utility and property tax payments reflected in the checking account records "in general might not ordinarily be significant, [however,] in a tax evasion case of a suspect who resided in Staten Island, payments to Florida companies inevitably would have interested the agent responsible for the expenditures investigation, thereby triggering further inquiry." *Id.* at 1226. The district court concluded that, since the checking account records inevitably would have been reviewed, the house inevitably would have been discovered because "[o]wnership of houses, vehicles, and other property is routinely and invariably of tremendous interest in such an investigation, and payments for taxes and utilities are essential means of establishing such ownership." *Id.* at 1226 (citing *United States v. Bianco,* 534 F.2d 501, 504-06 (2d Cir.), *cert denied,* 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976)). We agree and find sufficient evidence to support a conclusion of inevitable discovery.

With respect to Eng's ownership of the boat, the district court found that the government's position was "too speculative" and that, although Interdonato's post-search investigative procedures were routine and legitimate, the exhibits concerning the boat should have been suppressed. *Eng II,* 819 F.Supp. at 1226. However, the district court found the admission of evidence with respect to the boat to be harmless error "since the other evidence at trial provided overwhelming proof that Eng was guilty of tax evasion." *Id.* at

1226. We agree. Although the information regarding Eng's ownership of a boat in Florida would not likely inevitably have been discovered but for the illegal search revealing the registration document, we find that the admission of this evidence was harmless in light of the other evidence properly admitted.

CONCLUSION

Because the district court's particularized findings are not clearly erroneous and the district court properly concluded that the illegally obtained evidence inevitably would have been discovered, we accept the findings of the district court and reinstate and affirm the judgment of conviction heretofore entered in the district court.

APPENDIX D—August 10, 1993 Order of United States Courts of Appeals for the Second Circuit Denying Petition for Rehearing with Suggestion for Hearing *En Banc.*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of August on thousand nine hundred and ninety-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SHU YAN ENG, also known as AH SHU; CHO-KUEN WONG; KING ALBEO KONG; FOO WING YAM; SUE SANG ONG; HON KUENG NG;

Defendants,

SHU YAN ENG, also known as Ah Shu,

Defendant-Appellant.

Docket Numbers: 91-1683

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by Appellant SHU YAN ENG, also known as Ah Shu

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *en banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
By: Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
Filed: Aug. 10, 1993
Elaine B. Goldsmith, Clerk

APPENDIX E—Judgment of Conviction Rendered November 19, 1991.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

SHU YAN NG, DEFT #1.

Judgment including sentence
Under the Sentencing Reform Act

Case Number: CR 89-678-S

MARGARET ALVERSON
225 Broadway Suite 2100
New York, N.Y. 10007

THE DEFENDANT: was found guilty on count(s) #21, #22 and #23.

Accordingly, the defendant is ADJUDGED guilty of such count(s), which involve the following offenses:

Title & Section: Title 26, USC, Section 7201; Title 18, USC, Section 3623. Title 26, USC, Section 7201; Title 18, USC, Section 3571. Nature & Offense: Income tax evasion. Count Number: 21, 22 & 23.

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) #1 through #20 and is discharged as to such count(s).

Underlying indictment is dismissed on the motion of the United States.

The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number: 041-50-6896.

Defendant's mailing address: 134 Gauldy Avenue, Staten Island, N.Y. 10314.

Defendant's residence address: same as above.

Date of Imposition of Sentence: November 13, 1991.

Signature of Judicial Officer: I. LEO GLASSER

Name & Title of Judicial Officer: I. Leo Glasser, U.S.D.J.

Date: November 14, 1991.

A True Copy Attest:

Dated: Nov. 15, 1991
ROBERT C. HEINEMANN, Clerk
By: Louise Schillat
DEPUTY CLERK

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of (48) forty eight months, on Count #21. On Counts #22 and #23, the defendant is sentenced to imprisonment for (48) forty eight months, to run concurrent with term on Count #21.

The defendant shall surrender to the United States Marshal for this district, at 9:30 a.m. on 12/16/91.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of (3) three years, upon expiration of term of imprisonment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $150,150.00, consisting of a fine of $150,000.00 and a special assessment of $150.00.

These amounts are the totals of the fines and assessments imposed on individual counts, as follows: $75,000.00 on Count #21. $75,000.00 on Counts #22 and #23. Fine to be cumulative, for a total of $150,000.00.

STANDARD CONDITIONS OF SUPERVISOR

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any

paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of this court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.